Supreme Court, U.S.
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No. 06-503

IN THE

Supreme Court of the United States

CROWN EQUIPMENT CORPORATION
Petitioner,

v.

JEREMIAH "BART" MORRIS
Respondent.

On Petition for Writ Of Certiorari To The West Virginia Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Appeals of West Virginia erred when it held that, under the Privileges and Immunities Clause of the U.S. Constitution, Art. IV Sec. 2, West Virginia Code § 56-1-1-(c), a venue-limiting, forum non conveniens statute, which was passed by the legislature to prevent forum shopping and to address the burden of overcrowded courts, could not apply to law suits brought against West Virginia citizens and residents.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Supreme Court of Appeals of West Virginia.

The petitioner here and appellee below is Crown Equipment Corporation.

The respondent here and appellant below is Jeremiah "Bart" Morris.

The appellee below and respondent here is Jefferds Corporation d/b/a Homestead Materials Handling Company.

CORPORATE DISCLOSURE STATEMENT

Crown Equipment Corporation does not have a parent company, and no publicly held company owns ten percent or more of its stock.

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The opinion of the West Virginia Supreme Court of Appeals is reported at 633 S.E.2d 292 (W. Va. 2006), and is reprinted in the Appendix to the Petition ("Pet. App.") at 1A. The opinion of Justice Benjamin, concurring in result only, is reprinted at Pet. App. 26A. The concurring opinion of Justice Albright is reprinted at Pet. App. 35A. The dissenting opinion of Justice Maynard is reprinted at Pet. App. 42A. The opinions of the Circuit Court of Kanawha County, West Virginia are reprinted beginning at Pet. App. 47A.

JURISDICTIONAL STATEMENT

The West Virginia Supreme Court of Appeals, the highest court in West Virginia, issued its opinion on June 29, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

28 U.S.C. § 2403(b) may apply to this action, and Petitioner hereby affirms that the Attorney General of West Virginia has been served with a copy of this Petition pursuant to Supreme Court Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Privileges and Immunities Act of the U.S. Constitution, Art. IV, Sec. 2, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The pertinent part of West Virginia Code 56-1-1(c) states that "a nonresident of the state may not bring an action in a court of this state unless all or a

substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." Section 56-1-1 is reprinted in its entirety at 61A.

STATEMENT OF THE CASE

As the West Virginia Supreme Court of Appeals has recognized,

> the West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters. Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute . . . this Court has no blanket power to recast the statute to meet its fancy.

Riffle v. Ranson, 464 S.E.2d 763, 768 (W.Va. 1995). The West Virginia high court exceeded its powers when it struck down a section of the West Virginia legislature's venue statute in a results-oriented, activist opinion, which prompted two concurrences (one in result only) and a vehement dissent.

For years, the State of West Virginia had endured the burden of forum-shopping plaintiffs, whose cases had no substantial relationship to West Virginia, but whose abuse of the State's open legal borders exhausted the State's minimal judicial resources, to the detriment of the cases with ties to the State. In response, the legislature undertook the venture of crafting and enacting West Virginia Code § 56-1-1(c), a forum

non conveniens venue-limiting statute. See Riffle v. Ranson, 464 S.E.2d 763 (W.Va. 1995).

Under § 56-1-1(c), nonresidents of West Virginia may bring suit in West Virginia only if they establish that a substantial part of the acts and/or omissions giving rise to the alleged tort took place in West Virginia. Notably, the statute makes no distinction between citizens, requiring that West Virginians residing outside the state also show a substantial nexus between the tortious conduct and the State before they may bring suit there.

The West Virginia Supreme Court of Appeals has stricken the Legislature's venue statute as it applies to suits brought by non-residents against resident defendants. Accordingly, now non-resident plaintiffs will no longer need to establish a nexus between their cause of action and the State in order to bring suit against resident and citizen defendants. Conversely, non-resident plaintiffs still will need to establish a nexus with the State in order to sue non-resident defendants. The effect of this holding is to protect non-resident defendants from forum shopping plaintiffs, while at the same time giving non-residents an incentive to sue resident defendants, as a vehicle for obtaining venue in West Virginia (much like fraudulent joinder of local defendants to keep cases out of federal court). This holding stands the venue statute on its head, in clear contrast to the intent of the West Virginia Legislature, as its effect not only will result in a failure to preserve scarce judicial resources, but will also increase the risk of frivolous suits filed against its citizens and residents.

The West Virginia Legislature, seeking to preserve its judicial resources in a manner which would be most efficient for its residents, while still offering access to its courts if not so provided by the venue in which the alleged offense occurred, enacted a forum non conveniens, venue-limiting statute for certain specific factual situations. The West

Virginia Supreme Court of Appeals, in a results-driven decision which ignored the relevant and requisite constitutional inquiry, used the Privileges and Immunities Clause to stifle the efforts of the Legislature, in an activist move which exceeded its powers under its own laws. This Court is urged to accept this Petition to affirm the role of the court and to re-establish a thoughtful and constitutional venue statute rightfully created by the State's legislature.

A. Factual Background

The following facts are undisputed, as supported by the findings of fact of the West Virginia trial court. (See Pet. App. at 48A.) Respondent's Complaint in the Circuit Court of Kanawha County, West Virginia arises out of a workplace accident at his job in Grottoes, Virginia, while operating a stand-up rider forklift. Blaming the design of the forklift for his injuries, Mr. Morris brought a design defect, products liability action against petitioner Crown Equipment Corporation ("Crown") and Jefferds Corporation ("Jefferds"), the dealer through which respondent's employer purchased the forklift.

Crown is an Ohio corporation with its principal place of business in Ohio. While Jefferds is a West Virginia corporation, its entire handling and servicing of the subject forklift took place at and through its facility in Verona, Virginia. Jefferds has no facilities in Kanawha County, where respondent filed suit.

Respondent is a Virginia resident and citizen. All events leading up to and regarding the forklift accident occurred in Virginia. The subject forklift was sold, delivered, installed, and serviced through Jefferds's facility in Virginia. The subject forklift has never been in the state of West Virginia, and respondent has never alleged otherwise.

Presumably, because the accident occurred in Virginia, all of the witnesses to the accident are located in Virginia,

beyond the subpoena power of West Virginia courts. Crown's employees, the persons most knowledgeable about the design of Crown's forklift, are located outside of West Virginia. In sum, aside from the fact of Jefferds's incorporation, this case has no connection whatsoever with the state of West Virginia. Venue, however, was available in Virginia.

B. Proceedings Below

Respondent Jeremiah "Bart" Morris, a resident of Virginia, filed a multi-count lawsuit in the Circuit Court of Kanawha County, West Virginia seeking compensatory and punitive damages related to personal injuries he allegedly sustained during a May 4, 2002 forklift accident at his place of employment in Grottoes, Virginia. He sued petitioner Crown, the manufacturer of the forklift, and Jefferds, the West Virginia corporation which delivered the forklift to respondent's Virginia employer, through its office in Virginia.

Crown filed a motion to dismiss pursuant to West Virginia Code § 56-1-1(c), which provides in part that "a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."[1] After conducting a hearing, the trial court granted

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[1] In complete form, Rule 56-1-1(c) states as follows: "Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: *Provided*, that unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any

Crown's motion to dismiss. (Pet. App. at 47A.) It thereafter granted Jefferds's motion to dismiss, on the same grounds. (Pet. App. at 52A.) Respondent's Motion to Reconsider was denied by the Circuit Court. (Pet. App. at 56A.)

The matter traveled directly up to the West Virginia Supreme Court of Appeals, through respondent's petition for appeal. With minimal analysis which ignored the requisite constitutional inquiry under the Privileges and Immunities Clause, Art. IV, Sec. 2, the West Virginia high court struck down § 56-1-1(c) as applied to residents and citizens of West Virginia. See Morris v. Crown Equip. Corp., 633 S.E.2d 292, 300 (W.Va. 2006). (Pet. App. at 1A.)

When examining claims that citizenship or residency classifications offend privileges and immunities protection, courts may reject statutes only if they satisfy two criteria:

> (1) that the statute involves activity which is sufficiently basic to the livelihood of the nation so as to fall within the purview of the Privileges and Immunities Clause; and
> (2) that the challenged restriction deprives nonresidents of a protected privilege which is not closely related to the advancement of a substantial state interest.

Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64-65 (1988) (citations omitted); see also Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (the Privileges and

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legal basis to obtain personal jurisdiction over the defendant." This subsection became effective June 2003.

Immunities clause does not preclude discrimination against nonresidents where there is substantial reason for difference in treatment and discrimination practiced against nonresidents bears substantial relationship to state's objective). The West Virginia high court conducted no such analysis, instead rendering a results-oriented opinion which ignored the plain language of the statute and the substantial state interest upon which the statute was founded.

The majority opinion held that West Virginia Code § 56-1-1(c) "categorically immunize[d]" resident defendants from suits brought by non-resident plaintiffs, and "contravene[d] the constitutionally permissible scope of the venue statutes in an interstate context." Morris, 633 S.E.2d at 300. It was thus held not to apply to "civil actions filed against West Virginia citizens and residents." Id. Notably, the court recognized the distinction between citizens and residents for purposes of this statute.

However, a cursory glance at the language of the statute reveals that no such "categorical" exclusion is set forth. Rather, the statute merely requires that non-residents show that a substantial part of the acts giving rise to their claims occurred in West Virginia. Thus, the preference established by the statute is not categorical over all non-residents, but rather over those non-residents whose accidents took place outside of West Virginia.

Moreover, to find that a statute satisfies constitutional requirements, courts need only be presented with a substantial reason for the dissimilar treatment, which is closely related to a state interest. Piper, 470 U.S. at 284. Thus, even assuming the categorical exclusion of all suits brought by non-residents, had the West Virginia high court applied the requisite constitutional test, it would have found that the preference outlined in the statute was narrowly tailored and closely related to the state's substantial state interest in relieving

overburdened, overcrowded courts and efficiently using its judicial resources for actions with a substantial relationship to the State. West Virginia Code 56-1-1(c) simply allows for the state to effectively target its scarce judicial resources, provided by its citizens, while distinguishing only those persons who can bring actions in other venues - venues which in most scenarios would be more convenient and better equipped to handle an action where the injury occurred.

In a mindful effort to make sure that non-residents still have an opportunity to have their cases heard, even if venue is not proper in West Virginia, the Legislature even incorporated into the statute a safe harbor provision for those non-residents who, based on the relevant laws of the jurisdiction where venue was appropriate, could not file in the states where their causes of action arose. See W.Va. Code 56-1-1(c) (providing venue unless the case is time-barred).

REASONS FOR GRANTING THE PETITION

In rendering its results-oriented opinion, the West Virginia Supreme Court of Appeals ignored long-standing precedent set by this Court, which allowed states to apply principles of forum non conveniens and, more specifically, to do so through preference of its residents for access to its courts over nonresidents. See Section I.A., infra. Indeed, for decades, forum non conveniens and venue-limiting principles, either through statute, common law, or constitutional provision, have been staples of the jurisprudence in most states across the country. See Section I.B., infra.

Crown urges this Court to accept certiorari in this case for two reasons: so that it may re-establish a statute which is wholly consistent with the Court's well-established precedent

regarding venue and forum nonconveniens, as well as with those of numerous states; and so that it may correct the actions of an activist court, which exceeded its powers by striking down the appropriate and rightful efforts of the state legislature to serve a substantial state interest.

I. THE DECISION BELOW CONTRAVENES LONG-STANDING SUPREME COURT PRECEDENT AND PRINCIPLES RECOGNIZED IN NEARLY EVERY STATE IN THE COUNTRY.

A. The Decision of the Lower Court is In Direct Conflict with Well-Established Supreme Court Precedent.

Nearly a century ago this Court established that "[t]here are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 387 (1929). It thus upheld a New York statute, which limited venue of non-resident suits to certain specific conditions,[2] as it did not discriminate between citizens. In other words, at least for this specific purpose under the Privileges and Immunities Clause, a distinction between residents and citizens would be recognized, and because the statute placed non-resident citizens of New York in the same position as non-resident non-citizens of New York, it passed constitutional muster. See id. at 386-87.

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[2] The relevant section, in its entirety was a follows. " 'An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: . . . 4. Where a foreign corporation is doing business within this State.'" Douglas, 279 U.S. at 386.

Notably, in its flawed majority opinion, the West Virginia high court recognized this distinction between residents and citizens, holding that the Legislature's venue statute did "not apply to civil actions filed against West Virginia citizens and residents." Morris, 633 S.E.2d at 300 (emphasis added). A contrary interpretation would render redundant the court's decision to identify both categories of persons.

Subsequent to Douglas, this Court reaffirmed that non conveniens, venue-limiting statutes, such as that of West Virginia, do not violate the Privileges and Immunities Clause for preferring residents to non-residents. See Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950). The facts in Mayfield practically mirror those here, as they involved non-resident plaintiffs who had filed suit in Missouri, despite the fact that the accident giving rise to their negligence claims did not take place there. The highest court in Missouri had determined that the Privileges and Immunities Clause precluded Missouri courts from applying forum non conveniens. Disagreeing, this Court held

> [ ] Missouri cannot allow suits by nonresident Missourians for liability . . . arising out of conduct outside that State and discriminatorily deny access to its court to a non-resident who is a citizen of another State. But if a State chooses to prefer residents in access to often over-crowded courts and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control.

Id. at 3-4; see Chicago, Rock Island and Pacific Railroad Co. v. Riederer, 454 S.W.2d 36, 37 (Mo. 1970) (quoting this language); Gore v. U.S. Steel Corp., 104 A.2d 670, 675 (N.J.), cert. denied, 348 U.S 861 (1954) ("It is now well recognized that the dismissal of a nonresident's action under principles of Forum non conveniens in nowise violates the privileges and immunities clauses of the federal constitution."). Accordingly, this Court vacated the ruling so that the Missouri high court could "decide the availability of the principle of forum non conveniens . . . according to its local law." Mayfield, 340 U.S. at 5.

Local law in West Virginia required that the Circuit Court in Kanawha County, West Virginia dismiss this case by a nonresident whose action arose outside the State, and that the Supreme Court of Appeals affirm that decision under the Legislature's forum non conveniens statute. Instead, the West Virginia high court ignored the long-standing and directly relevant precedent set forth by this Court in Douglas and Mayfield.

B. The Decision of the Lower Court is in Direct Conflict with the Decisions of Numerous State Courts, Which Have Upheld Similar Applications of Forum Non Conveniens Principles.

Most if not all states have accepted the principle of forum non conveniens and have provided for its application, either through common law reliance on this Court, codification by state legislatures, or constitutional provisions, and some have done so precisely to relieve over-crowded courts and prevent forum shopping. Relying on this Court's precedent, the highest courts of those states consistently have

held that the Privileges and Immunities Clause does not preclude application of this principle to prefer residents of a state over non-residents. And many of these cases have nearly identical fact patterns to that here, where neither the plaintiff nor the act leading to the alleged injury have any ties whatsoever to the state in which the suit was filed.

For example, this Court declined to review a decision of the California Supreme Court which upheld the dismissal of a case brought by a New Mexico resident where the accidents giving rise to the allegations occurred in New Mexico. Price v. Atchison, T. & S. F. RY. Co., 268 P.2d 457 (Cal.), cert. denied, 348 U.S. 839 (1954). Relying on this Court's precedent and confirming the constitutionality of the lower court's application of forum non conveniens, California reaffirmed that it "has no policy, either statutory or court made, of discrimination against [ ] noncitizens of California . . . in determining when a nonresident of th[e] State will be given access to State courts to litigate a cause of action which arose elsewhere . . . . Id. at 460.

Likewise, Oklahoma, Texas, South Carolina, and Ohio, to name a few states, have abided by this Court's precedent in upholding forum non conveniens statutes. As the dissenting opinion in the West Virginia high court recognized, the Oklahoma Supreme Court upheld the forum non conveniens statute passed by its legislature, which allowed its courts to dismiss cases brought by non-residents where the action giving rise to the alleged tort did not occur in that state. Quoting this Court's precedent in Mayfield, the Oklahoma reiterated the principle that determining whether a non-resident would have access to its courts to litigate a claim which did not arise there did not discriminate among citizens. St. Louis –San Francisco Ry. Co. v. Superior Court, Creek County, 276 P.2d 773, 777 (Ok. 1954).

As recent as 1999, Texas's high court relied on Douglas to deem constitutional a state statute which allows its courts to dismiss a claim brought by a non-resident, unless the plaintiff "makes a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in Texas." Owens Corning v. Carter, 997 S.W.2d 560, 568 (Tex. 1999).

Likewise, South Carolina's venue statute has withstood constitutional scrutiny. See, e.g., Rosenthal v. Unarco Industries, Inc., 297 S.E.2d 638, 641-42 (S.C. 1982) (recognizing the preference for residents over nonresidents, upholding it under an equal protection challenge, and noting that it has "accomplish[ed] several legislative objectives rationally related to the state's interest."). South Carolina's statute regarding corporations is nearly identical to that of West Virginia. It allows actions brought by nonresidents only when it is demonstrated that "the cause of action shall have arisen or the subject of the action shall be situated within this State." S.C. Code 15-5-150 (1976); see also, Rosenthal, 297 S.E.2d at 641-42.

Similarly, Ohio's venue-limiting statute precludes non-residents from bringing suit there unless the injury occurred there. See Loftus v. Pennsylvania R. Co. Lininger, 140 N.E. 94, 95 (Oh. 1923). Relying on analogous cases in which this Court upheld other state statutes challenged under the Privileges and Immunities Clause, the Supreme Court of Ohio found the statute to be in accordance with the Constitution, as it was "based upon residence without regard to citizenship." Id. at 98.

Significantly, the Ohio high court made note of the fact that the plaintiff, a citizen and resident of Pennsylvania who was injured during the course of his employment in Pennsylvania, undoubtedly could have brought suit in

Pennsylvania, and would not have been prejudiced by having his case heard there. Moreover, while

> [w]e are not required to justify the acts of the Legislature, [ ] it might very pertinently be remarked at this point that the courts of our state are maintained at considerable expense, and only a small fraction of such expense is charged to litigants, the major portion being met by taxes and levied upon the property of the state. The constitutional mandate that all courts shall be open does not require that the burdens of taxation in a single state shall be further increased to provide remedies by judicial process for those who for reasons of their own prefer to reside in other states. It may be further remarked that the statute makes ample provisions for the stranger within our gates if injured in person or property while sojourning in, or traveling through, the state.

Id. at 99 (emphasis added). For nearly a century, states have enacted statutes to ease the burden on their courts and their taxpayers by making preferences based on residence. West Virginia is no different, having narrowly tailored a venue statute closely related to the State's substantial interest in protecting its courts and its citizens from the burdens of lawsuits with no relationship to the state. See infra, Section II.

Apart from the states discussed supra, numerous other states have enacted venue-limiting statutes or have otherwise applied the doctrine of forum non conveniens, and those statutes or decisions have withstood challenges under the Privileges and Immunities Clause. See Westerby v. Johns-Manville Corp., 32 Pa. D. & C.3d 163, 166-67 (Pa. Ct. Com.

Pls. 1982) (rejecting the plaintiff's Privileges and Immunities Clause challenge and citing cases from courts in nearly every state for the proposition that the doctrine of forum non conveniens "is now firmly imbedded in the law of virtually all American jurisdictions."). Many of these cases have involved fact patterns similar to that at issue here and remain good law, despite dating back several decades. See, e.g., Plum v. Tampax, Inc., 168 A.2d 315, 316-17 (Pa.) (dismissing a case brought by a nonresident plaintiff wherein the relevant actions did not occur in Pennsylvania), cert. denied, 368 U.S. 826 (1961); Johnson v. Chicago, Burlington and Quincy Railroad Co., 66 N.W.2d 763, 776 (Minn. 1954) (affirming dismissal of case brought by noncitizen and non-resident plaintiff where the relevant acts occurred outside the state); see also Mooney v. Denver & R.G.W.R. Co., 221 P.2d 628, 647 (Utah 1950) (engaging in a lengthy discussion of Supreme Court precedent on the application of forum non conveniens and holding that a court may dismiss a case brought by a non-resident where the action did not arise in that state); Whitney v. Madden, 79 N.E.2d 593, 585-96 (Ill.), cert. denied, 335 U.S. 828 (1948) (recognizing that the "privilege of free access to the courts must be tempered with reasonable limitations," that courts may decline to hear cases when courts are overburdened, and affirming dismissal of a case brought by a non-resident where the action arose outside the state.).

Simply put, the opinion of the West Virginia Supreme Court of Appeals flies in the face of decades of jurisprudence which has appropriately applied concepts of forum non conveniens, and which has allowed states and their courts to advance policies which prefer that their residents obtain access to scarce state resources over persons with no connection whatsoever to their state.

C. Preclusion of Non-Resident Suits Brought Against Resident Corporate Defendants is Permissible Under Forum Non Conveniens Principles.

While many of the cases above affirming the application of forum non conveniens to non-resident suits have addressed fact patterns with non-resident defendants (such as Crown), courts also consistently have affirmed dismissal of cases against resident defendants, and particularly in cases such as the present, in which the only connection to the state is the location of a defendant's incorporation. Under such circumstances, courts have recognized that the interests of justice and the policy underlying forum non conveniens are not satisfied by mandated venue based on residency.

New York's high court explained it well when it overruled prior precedent precluding dismissal of cases if one of the parties was domiciled there. Reversing a lower court decision which retained venue over a case brought by a Hawaii plaintiff against a New York corporation arising out of acts which took place in Hawaii, New York's high court reasoned that the application of forum non conveniens

> should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties. . . Forum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine – its flexibility based on the facts and circumstance of a particular case – is severely if not completely undercut when our courts are prevented from

> applying it solely because one of the parties is a New York resident or corporation.

Silver v. Great American Ins. Co., 278 N.E.2d 619, 622 (N.Y. 1972) (emphasis added). The court added that "our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." Id. at 621 (emphasis added). This opinion, handed down more than thirty years ago, remains good law and clearly has passed constitutional muster.

Courts in Delaware, New Jersey, Pennsylvania, Missouri, and even this Court, share this view, that a forum non conveniens statute applies to cases involving resident and citizen defendants, and that it is permissible to dismiss a case on such grounds when the defendant is a resident and citizen of the state. See Chicago, Rock Island and Pacific Railroad Co. v. Riederer, 454 S.W.2d 36, 39 (Mo. 1970); Gonzales v. Atchison Topeka and Santa Fe Railway Co., 371 P.2d 193, 199 (Kan. 1962) (dismissing case against resident defendant corporation); Gore v. U.S. Steel Corp., 104 A.2d 670, 676-77 (N.J.), cert. denied, 348 U.S 861 (1954) (dismissing a case where the only connection to New Jersey was the defendant's incorporation and recognizing the burden which would be placed on courts extensively litigating foreign cases because plaintiffs perceived an advantage there); see also Winsor v. United Air Lines, Inc., 154 A.2d 561, 564 (Del. Sup. Ct. 1958) (dismissing a case where the only contact was as the state of the defendant's incorporation); Westerby, 32 Pa. D.&C.3d at 178-79 (rejecting argument that forum non conveniens did not apply when defendant corporation was Pennsylvania resident) (citing cases).

This Court has stated that when determining the appropriate forum,

> the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of forum non conveniens, which resists formalization and looks to the realities that make for doing justice.

Koster v. Amer. Lumbermens Mut. Casualty Co., 330 U.S. 518, 528 (1947). Here, while Jefferds is incorporated in West Virginia, its office in Verona, Virginia was responsible for every activity involving the subject forklift in this case. The forklift was sold, delivered, and serviced through their Virginia office, which is undisputed by respondent. The forklift never entered the state of West Virginia. The only connection to West Virginia is the mere fact of Jefferds's corporate domicile. All witnesses to the accident and, more significantly to this design defect case, all witnesses with knowledge regarding the design of the forklift, are located outside the state of West Virginia. "[T]he realities that make for doing justice" and simple common sense instruct that this case is best tried in Virginia. See Koster, supra.

It is plain that the question of venue as applied to this fact pattern has been considered and ruled upon extensively by various courts. The West Virginia Supreme Court of Appeals simply got it wrong this time, and in so doing, it exceeded its powers and squelched the efforts of the West Virginia

legislature to address the very real and serious state concern of overburdened courts and scarce judicial resources.

II. THE STATUTE STRICKEN BY THE WEST VIRGINIA HIGH COURT RAISES AN ISSUE OF CRITICAL IMPORTANCE TO THE EFFORTS OF WEST VIRGINIA TO ADDRESS THE SUBSTANTIAL STATE CONCERN OF OVERBURDENED COURTS, SCARCE JUDICIAL RESOURCES, AND FORUM SHOPPING PLAINTIFFS.

A. Aware of How Matters With No Interest to or Nexus With the State were Crippling West Virginia's Judicial System, the Legislature Enacted a Forum Non Conveniens, Venue Statute to Address this Substantial State Interest.

The West Virginia judicial system serves a small, economically-challenged State. West Virginia's 55 counties are divided into 31 judicial circuits, which are presently served by 65 circuit judges. The various judicial circuits vary in size and composition. Many of the judicial circuits serve only one West Virginia county. Some judicial circuits encompass multiple counties, including two circuits that serve four counties. One judicial circuit is served by seven circuit judges, while 11 circuits are served by a single circuit judge.

Significantly, the circuit courts are West Virginia's only state trial court of record. As such, circuit courts are the all-purpose workhorses of the West Virginia judicial system. Circuit courts have jurisdiction over all civil cases at law in which more than $300.00 is in controversy, as well as all cases in equity; proceedings in habeas corpus, mandamus, quo warranto, prohibition, and certiorari. Circuit courts also have jurisdiction over both felony and misdemeanor criminal matters. In addition, circuit courts hear appeals from magistrate courts, municipal courts, family law courts, and various administrative agencies. The circuit courts also have

responsibilities relating to juvenile and mental hygiene proceedings. The Supreme Court of Appeals of West Virginia has reported that in 2004, 46,890 cases were filed in West Virginia's circuit courts (excluding family court appeals), of which 32,299 were civil case filings.[3]

The Supreme Court of Appeals of West Virginia is the State's court of last resort, and its only true appellate court. In fact, West Virginia is one of only 11 states served by a single appellate court. For years, the Supreme Court of Appeals of West Virginia has claimed – with statistical justification – to be "the busiest appellate court of its type in the United States."[4]

Regrettably, the perception of West Virginia's judicial system by corporate America has been, and remains, poor. The United States Chamber of Commerce has commissioned Harris Interactive, Inc. to conduct yearly surveys of in-house general counsel and other senior litigators at public corporations in an effort to explore how reasonable and fair the tort liability system is perceived to be by corporate America. West Virginia has consistently ranked at or near the bottom in all of those surveys. In the January 11, 2002 Final Report of the U.S. Chamber's "State Liability Systems Ranking Study," West Virginia ranked 49th among the 50 States, only surpassing Mississippi. The survey revealed that West Virginia was perceived to be among the worst jurisdictions for the treatment of (1) tort and contract litigation, (2) class action suits, (3) punitive damages issues, (4) motions for summary judgment or dismissal, (5) discovery issues, and (6) issues relating to scientific and technical evidence. Further, the survey revealed that West Virginia was perceived to be among the worst jurisdictions with respect to

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[3] See http://www.state.wv.us/wvsca/circuits.htm, "Circuit Courts – 2004 Annual Report."

[4] See, e.g., http://www.state.wv.us/wvsca/Supreme.htm.

(7) judicial impartiality, (8) judicial competence, (9) jury predictability and (10) jury fairness.[5] Similar surveys taken after 2002 have yielded similar results.

Whether or not the perception of West Virginia's judicial system by the corporate world is fair or accurate, the West Virginia Legislature has recognized that those perceptions do influence litigators. Consequently, West Virginia has routinely been on the leading edge of mass tort litigation practice during the past decade. Further, the perception in West Virginia has been that creative personal injury and other litigators have and will continue to search for avenues to escape jurisdictions, such as the Commonwealth of Virginia, which are perceived to be more conservative than West Virginia.

West Virginia Code § 56-1-1(c) is the West Virginia Legislature's response to the perception that the State has or will become a magnet for litigation with little or no relationship to the State. The statute reflects the Legislature's desire that West Virginia's scarce judicial resources be devoted to matters of interest to the State and its residents. The case presently before the Court is precisely the type of lawsuit which the statute was intended to prevent from burdening West Virginia's judicial system. In this matter, the Respondent ignored the facts that (a) he is a Virginia resident, (b) he is or was employed in Virginia (c) his accident occurred at his place of employment in Virginia, (d) he was allegedly injured while using a forklift sold and serviced in Virginia, (e) he was treated for his alleged injuries in Virginia, (f) virtually all of the evidence relevant to his cause of action and claim for injuries is situated in Virginia, and (g) for the most part, Virginia law will be applicable to his claim based on the doctrine of *lex loci delicti*. The Respondent's decision to file suit in West Virginia, and not Virginia, is obviously motivated

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[5] See http://www.instituteforlegalreform.com/resources/index.html, "2002 State Liability Systems Ranking Study."

by a single factor: West Virginia has adopted a system of comparative negligence, while Virginia adheres to a stricter doctrine of contributory negligence that, if proven, will bar a recovery by a plaintiff. Cf., e.g., Ponirakis v. Choi, 262 Va. 119, 124, 546 S.E.2d 707, 710-11 (2001). Even though a West Virginia circuit court is bound to apply Virginia law to the Respondent's claim, the Respondent and his counsel no doubt recognize that the Supreme Court of Appeals of West Virginia has held that it will not apply a foreign jurisdiction's contributory negligence doctrine on the grounds that such a doctrine is contrary to West Virginia's public policy. Syl. Pt. 2, Mills v. Quality Supplier Trucking, Inc., 510 S.E.2d 280 (W.Va. 1998).

West Virginia's strong interest in devoting its scarce judicial resources is advanced in a fair and balanced fashion. West Virginia Code § 56-1-1(c) distinguishes between residents and non-residents, not between citizens of separate states. Moreover, to ensure protection of every person's constitutional right of access to courts, the statute allows a non-resident plaintiff to file suit in West Virginia if the non-resident cannot obtain jurisdiction in either federal or state court in the state where the action arose, so long as the claim is not time-barred by a relevant statute of limitations, or otherwise. Thus, the State took every precaution to ensure that its venue statute was tailored to address this substantial concern without denying constitutional rights or treating individuals unfairly.

B. The West Virginia High Court's Holding Turns the Venue Statute on its Head, in Clear Contravention of the Intent of the West Virginia Legislature.

As a result of the ruling from the West Virginia Supreme Court of Appeals, § 56-1-1(c) no longer applies to West Virginia citizens and residents. Accordingly, non-

residents no longer need to establish a nexus with West Virginia in order to sue a resident or citizen of the State. As a result, a statute which the West Virginia Legislature enacted to protect its citizens and its courts from suits which have no basis for litigation in the State, has become a statute which not only encourages such suits, but also provides an incentive to sue its residents – for now, non-resident plaintiffs wanting to make use of a perceived advantage in West Virginia courts will seek out resident West Virginians to sue in order to establish venue there.

Take, for example, a group of potential pharmaceutical litigants from Virginia with a savvy plaintiff's attorney who believes that West Virginia has a more advantageous venue for a piece of mass tort litigation – an opinion which is not novel. See supra, II.A. The pharmaceutical company is not a West Virginia corporation; however, some of the plaintiffs had been treated for their alleged injuries by physicians in West Virginia. Before the West Virginia high court's holding, a showing would be necessary that the acts or omissions giving rise to the action occurred in West Virginia before suit could be brought there. Such was the intent of the Legislature.

Now, these Virginia plaintiffs, who could not otherwise have sued in West Virginia and who would not otherwise have sued their physicians, may do so to take advantage of West Virginia's perceived venue advantages. The effect: a West Virginia court is now burdened with a mass tort involving a non-resident pharmaceutical company and non-resident plaintiffs, and West Virginia physicians who otherwise would never have been sued are now burdened to argue venue is appropriate in West Virginia with a law suit.

There simply is no rationale which would suggest that such a fact pattern is what the Legislature contemplated when it passed its venue statute. It is completely converse to the stated intent of the Legislature to preserve its courts for West Virginians and for nonresidents who are injured in the state. West Virginia courts will continue to be burdened and bogged

down by cases with no connection to the State, and West Virginia citizens, including physicians who must consider malpractice insurance, face the heightened risk of frivolous lawsuits. In effect, the West Virginia Supreme Court of Appeals has turned the venue statute on its head, to hinder West Virginia courts and residents.

One might argue that the Supreme Court of Appeals of West Virginia, as the highest court in the State, is well-situated to assess the utilization of judicial resources. However, as the branch of government which causes the courts to be funded and which is charged with the task of enacting the public policy of West Virginia into law, the West Virginia Legislature's decision to enact a venue-limiting, forum non conveniens statute must be respected. The application of the Privileges and Immunities Clause by West Virginia's high court was in error. This Court should correct that error, and thereby enable the Legislature's policy decision to remain effective.

CONCLUSION

For the reasons set forth herein, this Petition for Writ of Certiorari must be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

January 2006 Term

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WEST VIRGINIA

No. 32751

JEREMIAH "BART" MORRIS,
Plaintiff Below, Appellant

v.

CROWN EQUIPMENT CORPORATION,
a foreign corporation; and JEFFERDS CORPORATION,
dba HOMESTEAD MATERIALS HANDLING COMPANY,
a West Virginia Corporation,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
Hon. Tod J. Kaufman, Judge
Case No. 04-C-1174

REVERSED AND REMANDED

Submitted: March 29, 2006
Filed: June 29, 2006

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JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. Under the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.

3. *W.Va. Code*, 56-1-1(c) [2003] does not require a plaintiff to separately establish venue for each defendant.

Starcher, J.:

In this case we hold that a plaintiff cannot be denied the right to bring a products liability lawsuit in this state against a West Virginia corporation and an out-of-state corporation merely because the plaintiff is a resident of another state.

I.

Facts & Background

The complaint in the instant case alleged the following facts: the appellant and plaintiff below, Jeremiah "Bart" Morris ("Morris"), a resident and citizen of Virginia, suffered a severe leg injury at his place of employment in Virginia while operating a stand-up forklift that was distributed and serviced by the appellee and defendant below, Jefferds Corporation, dba Homestead Materials Handling Company ("Jefferds"), a West Virginia corporation. The forklift was designed, manufactured, and distributed by the appellee and defendant below, Crown Equipment Corporation ("Crown"), an Ohio corporation.[1]

On April 30, 2004, Morris filed a civil action against Jefferds and Crown in the Circuit Court of Kanawha County, West Virginia, alleging various products liability theories of recovery, including negligence, strict liability, failure to warn, and breach of warranty, as well as asserting a claim for punitive damages.

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[1] The complaint further alleged that Jefferds was incorporated under the laws of West Virginia, had its principal place of business in Kanawha County, West Virginia, conducted business in Kanawha County, West Virginia, and was engaged in the business of servicing, maintaining, providing warnings, providing training, testing, inspecting, marketing, distributing, and selling materials handling equipment, including Crown stand-up forklifts. The complaint further alleged that Jefferds provided, serviced, maintained, tested, inspected, marketed, provided with warnings, provided training for, and distributed to Morris' employer the Crown stand-up forklift upon which Morris was injured.

Jefferds and Crown filed motions to dismiss the complaint for improper venue based upon *W. Va. Code,* 56-1-1 [2003], which states:

> (a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
>
> (1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is;
>
> (2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management;
>
> (3) If it be to recover land or subject it to a debt, where the land or any part may be;
>
> (4) If it be against one or more nonresidents of the state, where any one of them may be found and served with process or may have

estate or debts due him or them;

(5) If it be to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

(6) If it be on behalf of the state in the name of the attorney general or otherwise, where the seat of government is; or

(7) If a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his or her court, the action or suit may be brought in any county in an adjoining circuit.

(b) Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

(c) *Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted*

> *occurred in this state: Provided, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.*
>
> *In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refiling in a court in any other state or jurisdiction.*

(Emphasis added.)

Jefferds and Crown argued in their motions to dismiss that Morris is a nonresident[2] of West Virginia, and

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[2] This opinion will primarily use the term "nonresident" to mean a nonresident or noncitizen of West Virginia; and similarly, the term" resident" will mean resident *or* citizen. It is now established that under the Privileges and Immunities Clause there is ordinarily no difference between discrimination based on a person's "residence" and discrimination based on a person's "citizenship."

> . . . [D]espite some initial uncertainty . . . it is now established that the terms "citizen" and "resident" are "essentially interchangeable," *Austin v. New Hampshire*, 420 U.S. 656, 662, n. 8[, 95 S.Ct. 1191,

that no substantial part of Morris' cause of action arose in West Virginia. Therefore, Jefferds and Crown argued, the provisions of *W. Va. Code*, 56-1-1(c)[2003] required dismissal of Morris' case on improper venue grounds, unless Morris demonstrated by affidavit that he could not bring his case in some other jurisdiction.

Morris argued in reply that the application of *W Va. Code*, 56-1-1(c) [2003] to Morris as a nonresident in the fashion suggested by Jefferds and Crown was unconstitutional under the Privileges and Immunities Clause of the United States *Constitution,* Art. IV, Sec. 2, which states in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[3]

> 1195 n. 8, 43 L.Ed.2d 530 n. 8] (1975), for purposes of analysis of most cases under the Privileges and Immunities Clause.

United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208, 216, 104 S. Ct. 1020, 1026 - 1027, 79 L.Ed. 2d 249, ___ (1984).

> Similarly, while the Court unquestionably has come to treat the terms "citizen" and "resident" in this area as "essentially interchangeable," *Austin v. New Hampshire,* 420 U.S., at 662, n. 8, it has done so not out of a general disregard for the Constitution's language, but rather because the practical relationship between residence and citizenship is close enough that discrimination on the basis of the one criterion effectively amounts to discrimination based on the other.

Id. at 234, 104 S.Ct. at 1036, 79 L. Ed. 2d at 249 (1984). Thus, when weighing the persuasiveness and relevance of decisions in cases that statedly rest their reasoning on the premise that discrimination against individuals on the basis of citizenship is constitutionally suspect – while discrimination on the basis of residence is constitutionally inoffensive – the current irrelevance of that distinction in most cases must be taken into account.

[3] Morris also raised the Open Courts Clause of the *West Virginia Constitution*, Art. III, Sec. 17, which states that:

> The courts of this State shall be open, and *every person*, for an injury done to him, in his person, property, or

Morris argued that the interpretation and application of *W. Va. Code*, 56-1-1(c) [2003] asserted by Jefferds and Crown was constitutionally impermissible because such an interpretation and application would impose a categorical bar upon nonresidents of West Virginia in their access to the West Virginia courts in cases where an otherwise similarly situated resident of West Virginia would not experience such a bar.

Morris further argued that Jefferds' status as a West Virginia corporation established proper venue as to Jefferds, and that because Jefferds served as a venue-giving defendant, Morris could properly join Crown as well.

Finally, Morris argued that the statutory prerequisite for the application of *W. Va. Code*, 56-1-1(c) [2003] – that "all or a substantial part of the acts or omissions giving rise to the claim asserted [did not occur in West Virginia]" – was not established. Morris argued that his Complaint and two subsequent Amended Complaints in fact did set forth allegations establishing that a "substantial part" of the acts or omissions giving rise to his claims did occur in West Virginia.[4]

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reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

(Emphasis added).

In light of our disposition of the instant case, we do not address this constitutional provision.

[4] The Federal venue statute, 28 U.S.C. Sec. 1391, provides that venue lies in any district "in which *a substantial part* of the events or omissions giving rise to the claim occurred . . . " (Emphasis added). "[T]his rule ... is open to the possibility that a claim may have arisen in more than one district . . .," Hodson *v. A. H. Robins Co.*, 528 F. Supp. 809, 814 (E.D. Va. 1981). "[T]he plaintiff is not required to establish that his chosen venue 'has the most substantial contacts to the dispute; rather, it is sufficient that *a* substantial part of the events occurred [here], even if a greater part of the events occurred elsewhere.'" *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 568 (D. Vt. 2004) (emphasis added, *citing Kirkpatrick v. Rays Group*, 71 F. Supp. 2d 204, 212 (S.D.N.Y. 1996)). The Supreme Court of Pennsylvania has stated that determining whether conduct is a substantial factor ". . . simply involves the making of a judgment as to

whether defendant's conduct . . . is so insignificant that no ordinary mind would think of it as a cause for which a defendant should be held responsible." *Ford v. Jeffries*, 379 A. 2d 111, 114 (Pa. 1977) (citing the *Restatement (Second) of Torts* sec. 431, comments a. and b.).

For reasons that do not appear in the record, the circuit court did not grant Morris' timely motions for leave to amend his complaint, and denied Morris' requests for leave to conduct limited discovery to establish further facts that would show that venue was proper in West Virginia. A party may amend a pleading by leave of court, and such leave shall be freely given when justice requires. *W.Va.R.Civ.P.* 15(a); *Brooks v. Isinghood*, 213 W.Va. 675, 684, 584 S. E. 2d 531 (2003).

The circuit court did indicate that it had "considered" the allegations in Morris' amended complaints in ruling on the Jefferds and Crown motions to dismiss.

Morris's Second Amended Complaint stated, in part:

> i. Jefferds inadequately serviced and maintained, failed to provide adequate warnings, failed to provide adequate training, provided warranties, failed to adequately test, failed to adequately inspect, failed to adequately analyze the dangers of, failed to adequately disclose the dangers of, failed to guard against the dangers of, marketed, distributed, installed, and/or sold the forklift at issue at or from its offices in West Virginia;
>
> ii. Jefferds made (or failed to make) management level analyses and decisions from its West Virginia corporate headquarters related to service and maintenance schedules and items; training of service and maintenance personnel; product safety and the dangers associated with the use of the product; operator safety; warnings to be provided and the sufficiency thereof; operator training and instruction and the sufficiency thereof; warranties to be provided; testing, inspection; necessary guarding; product lines to be carried; marketing; distribution; sale; installation; associated contractual arrangements or other agreements; and other items related to stand-up forklifts in general, and the forklift which caused the plaintiffs injury in particular;
>
> iii. Jefferds made the contractual arrangements or other agreements related to the provision and installation of the subject forklift to the Alcoa facility, through its office in West Virginia.
>
> iv. The instructions, manuals, warnings, service records, installation records, warranties, and other

The circuit court accepted Jefferds' and Crown's arguments based on Morris' nonresidency and *W.Va. Code*, 56-1-1(c) [2003]. By orders dated September 1, 2004, and November 24, 2004, the circuit court granted the appellees' motions to dismiss. The circuit court also issued an "Order Denying Plaintiff's Motion to Reconsider" on November 29, 2004. Morris appeals from these orders.

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information about the forklift were provided by Jefferds out of its West Virginia offices;

v. The employees of Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were provided from its office in West Virginia;

vi. The employees of Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were trained at its office in West Virginia;

vii. Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the design of Crown's stand-up forklifts and the associated dangers;

viii. Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the accident history of Crown stand-up forklifts, and to warn its customers and end users thereof;

ix. Jefferds failed, at its office in West Virginia, to adequately analyze the hazards to the operators of the forklifts and guard against the same;

x. Jefferds failed, from its offices in West Virginia, to provide adequate operator training and instruction;

xi. Jefferds marketed, distributed, sold, or otherwise installed the forklift from its offices in West Virginia;

x. Jefferds engaged in other, as yet unidentified, substantial acts or omissions related to the claims being asserted.

Although it is not necessary to decide this issue in light of our resolution of the instant case, it seems clear that the plaintiff's Second Amended Complaint does sufficiently allege that a "substantial" portion of the acts or omissions giving rise to Morris' claims occurred in West Virginia.

II.
Standard of Review

A trial court's ruling on a motion to dismiss is reviewed under a *de novo* standard. *Kopelman and Associates v. Collins,* 196 W.Va. 489, 492, 473 S. E. 2d 910, 913 (1996). Constitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review. *West Virginia ex rel. Citizens Action Group v. West Virginia Economic Development Grant Committee,* 213 W.Va. 255, 261-262, 580 S. E. 2d 869, 875-876 [2003]. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

III.
Discussion

We begin our discussion by examining the Privileges and Immunities Clause, Art. IV, Sec. 2, of the *United States Constitution.* We then look to what courts have said about access to the courts and the Clause.

A.
Privileges and Immunities

In *Austin v. New Hampshire,* 420 U.S. 656, 662, 95 S.Ct. 1191, 1195, 43 L.Ed. 2d 530, 535-536 (1975), the Court stated:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism.

(Footnote omitted.)

In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 380-382, 98 S.Ct. 1852, 1858-1859, 56 L.Ed. 2d 354, 363-364 (1978), the Court quoted from *Paul v. Virginia*, 8 Wall. 168, 180 (1869):

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

and from *Hague v. CIO*, 307 U.S. 496, 511, 59 S.Ct. 954, 962, 83 L. Ed. 1423, 1434 (1939) (Roberts, J. concurring):

> . . . Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of

> that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

(Footnotes omitted.)

B.

Access to the Courts

On the subject of access to the courts in the context of the Privileges and Immunities Clause, Am. Jur. 2d, *Constitutional Law*, Sec. 769 (2006) says:

> Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions. This privilege includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind. *While a state may decide whether and to what extent its courts will entertain particular causes, any policy the state may choose to adopt must operate in the same way upon citizens of other states as upon its own, and the privileges it affords to the latter class it must afford to the same extent to the other, but not to any greater extent.*

(Footnotes omitted, emphasis added.)

In *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233, 54 S.Ct. 690, 691, 78 L. Ed. 1227, 1229 (1934), the Court stated:

> The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to

> citizens of other states substantially the same right of access to its courts as it accords to its own citizens.

(Citation omitted.)

In *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142,148-149,28 S.Ct. 34, 35, 52 L.Ed.143, 146 (1907), the Court stated:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

(Citations omitted.)

* * *

> The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. . . . But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from

> the citizens of other states is void, because in conflict with the supreme law of the land.

In Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 562, 40 S.Ct. 402, 404, 64 L.Ed. 713, 716 (1920), the Court stated:

> . . . [t]he constitutional requirement is satisfied if the nonresident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.[5]

Finally, a leading commentator has said:

> The familiar rhetorical statements of the unqualified duty of a state to open its courts to citizens of other states are no longer to be

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[5] *See also Missouri Pacific Railroad Co. v. Clarendon Boar Oar Co.*, 257 U.S. 533, 535, 42 S.Ct. 210, 211, 66 L. Ed. 354, 356 (1922) ("[The Privileges and Immunities Clause] secures citizens of one State the right to resort to courts of another, equally with citizens of the latter State[.]"); *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698, 704, 62 S.Ct. 827, 830, 86 L. Ed. 1129, 1134, (1942); *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 78, 40 S.Ct. 228, 64 L.Ed. 460, 469 (1920).

> taken literally . . . These statements do, however, express the truth that *the privileges-and-immunities clause requires a state to open the doors of its courts to citizens of other states who assert claims against local residents and citizens, even on causes of action predicated upon the law of another state, if it would allow its own citizens to assert such a cause of action.* . . . [I]t is the duty of the governments to make their citizens and persons residing within their borders respond to their civil obligations; any other rule would be intolerable.

(Emphasis added.) Carrie and Schechter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale Law Journal 1323, 1383 (1960).[6]

From the foregoing authorities, it may be concluded that there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit.

The appellee Jefferds argues that despite the foregoing authority, *W. Va. Code*, 56-1-1(c) [2003] should be read to set forth a constitutionally valid rule that categorically bars nonresidents from bringing certain lawsuits – even lawsuits against West Virginia residents – when the same lawsuit could be brought by a West Virginia resident.

That is, under Jefferds' proposed reading and application of *W. Va. Code,* 56-1-1(c) [2003], if Mr. Morris and a West Virginia resident had both been injured in the accident in question, the West Virginia resident would encounter no obstacle to filing suit against Jefferds in West Virginia. Only Morris would be so barred, by reason of his

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[6] *See also Gober v. Federal Life Ins. Co.*, 255 Mich. 20, 24, 237 N.W. 32, 33 (1931) (applying the Privileges and Immunities Clause) ("If defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this State on her cause of action.").

residency in Virginia. However, the foregoing-quoted authorities are agreed in stating that Privileges and Immunities Clause counsels against such discrimination against nonresidents and favoritism and protectionism on behalf of residents.

Jefferds argues that this Court is restricted by our decision in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995) from narrowing or constraining a broad, literal application of *W.Va. Code*, 56-1-1(c) [2003] that would categorically bar suits by nonresidents in West Virginia courts in instances when the same suit could be brought by a West Virginian – even cases against West Virginia defendants.

Our decision in *Riffle* simply deferred to Legislatively-prescribed principles governing intra-state venue. However, in *Riffle* this Court explicitly disavowed applying its decision to interstate situations. 195 W.Va. at 128, n.11, 464 S.E.2d 763, at 770, n.11. This Court also noted in *Riffle* that none of the parties had raised constitutional challenges to the statutory language at issue in that case. *Id.*, 195 W.Va. at 126 n.6, 464 S. E. 2d at 768 n.6. Accordingly, *Riffle* does not and could not authorize this Court to disregard the Privileges and Immunities Clause of the *United States Constitution,* when that issue is properly brought, as it affects a provision of our venue statutes in an interstate context.

A reading or application *of W.Va. Code*, 56-1-1(c) [2003] that would categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a nonresident would contravene the constitutionally permissible scope of the venue statutes in an interstate context. There is no evidence in the cases cited by the parties or identified in this Court's research showing any trend in favor of such distinctions. Additionally, erecting such barriers would contravene established West Virginia

law, including other provisions of *W.Va. Code*, 56-1-1 [2003].[7]

It is axiomatic that

> . . . wherever an act of the legislature can be so *construed and applied* as to avoid a conflict with the constitution, and give it the

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[7] *W.Va. Code*, 56-1-1(a)(1)[2003] states that venue lies against a domestic corporation doing business in this State wherein its principal office is located, or where its president or principal officer resides. We recognized in *Wetzel County Savings and Loan v. Stern Bros., Inc.*, 156 W.Va., 693, 699, 195 S.E. 2d 732, 737 (1973), that the principal place of business of the defendant corporation was an appropriate venue for a lawsuit. In the Syllabus of *State ex rel. Huffman v. Stephens*, 206 W.Va. 501, 526 S.E.2d 23 (1999), we stated:

> Whether a corporation is subject to venue in a given county in this State under the phrase in W. Va.Code, 56-1-1(b), "wherein it does business" depends upon the sufficiency of the corporation's minimum contacts in such county that demonstrate it is doing business . . ..

See Syllabus, *Brent v. Board of Trustees of Davis and Elkins College*, 163 W.Va. 390, 256 S.E.2d 432 (1979):

> If a corporation has made a contract to be performed in whole or in part by any party thereto in a county, has committed a tort in whole or in part in that county, or has manufactured, sold, offered for sale or supplied any product in a defective condition and such product has caused injury to any person or property within that county, it is doing business there and the county's courts have venue to try suits against it which arise from or grow out of such contract, tort or manufacture, sale, offer for sale or supply of such defective product.

See also McGuire v. Fitzsimmons, 197 W.Va. 132, 136, 475 S.E. 2d 132,136 (1996):

> The plain language of W. Va.Code, 56-1-1(a)(1) [1986] does not limit the venue to one county but provides at least two possible justifications for proper venue: either the residence of the defendants or where the "cause of action arose."

> force of law, such construction will be adopted by the court.

(Emphasis added.)

Peel Splint Coal Co. v. State, 15 S.E. 1000, 1004 (1892). A narrow-breadth reading of a statute to assure that its application is constitutionally proper is appropriate as a less-intrusive remedy, *cf. Weaver v. Shaffer*, 170 W.Va. 107, 111, 290 S.E.2d 244, 248 (1980).

We therefore hold that under the Privileges and Immunities Clause of the *United States Constitution,* Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.

Applying the foregoing principles to the facts of the instant case, we conclude that the circuit court impermissibly applied *W.Va. Code*, 56-1-1(c) [2003] to treat Mr. Morris' nonresidency as a categorical bar to his bringing a suit in West Virginia against Jefferds. Moreover, Jefferds is a West Virginia corporation, and the provisions of *W.Va. Code,* 56-1-1(c) [2003] do not apply to Morris' suit against Jefferds.

Therefore, the circuit court's dismissal of Morris' suit against Jefferds must be reversed.

C.

Venue-Giving Defendant

We turn our discussion to the circuit court's dismissal of Morris' case against Crown, the manufacturer of the product that Morris says caused his injury. Crown is not a West Virginia corporation, but it is the manufacturer of a product that was sold and distributed by a West Virginia corporation.

It must first be recognized that Morris' suit against Crown is essentially a products liability case. Products liability suits typically allege that a manufacturer designed and/or produced a product and put the product into the

stream of commerce, and that the product was unsafe or flawed in such a way so as to give rise to the liability of the manufacturer for injuries resulting from the use of the product. The alleged unsafeness or flaw(s) may be as a result of the actual design or construction of the product, or in the adequacy of warnings provided to the user(s) of the product. *See generally Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979) and its progeny.

Products liability cases are a feature of every state's law, and manufacturers who put their products into the stream of interstate commerce expect that they may be called to account in court for the safety of the design and manufacture of their products in other states – even though no "culpable" conduct by the manufacturer relating to the design or manufacture of the product occurred in the jurisdiction in which the claim against the manufacturer is brought. This fundamental principle of products liability law underlies our analysis.

A second fundamental principle that must be recognized is that:

> This Court follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process.

Syllabus Point 1, *Staats v. Co-Operative Transit Co.*, 125 W.Va. 473, 24 S.E.2d 916 (1943); *McConaughey v. Bennett's Executors*, 50 W.Va. 172, 179, 40 S.E. 540, 541 (1901). *See also State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 231, 366 S.E.2d 738, 739-40 (1988); *McGuire v. Fitzsimmons*, 197 W.Va. 132, 137, 475 S.E.2d 132, 137 (1996); *Union Carbide & Carbon Corp. v. Linville*, 142 W.Va. 160, 164-165, 95 S.E. 2d 54, 57 (1956); *Webber v. Offhaus*, 135 W.Va. 138, 146-147, 62 S.E. 2d 690, 696 (1950); *McConaughey & Co. v. Bennett*, 50 W.Va. 172, 179, 40 S.E. 540, 542-543 (1901). The principle of the venue-

giving defendant has been an established feature of our law for more than one hundred years, and it is closely intertwined with our procedural rules on joinder.[8]

Complementing and reflecting the longstanding venue-giving defendant principle in our case law and our procedural rules, the provisions of *W.Va. Code*, 56-1-1 [2003] state that venue for "*any* civil action" or "*the* cause of action" is appropriate "wherein *any* of the defendants may reside . . ." and "where *one or more* of the defendants resides." *W Va. Code*, 56-1-1(a) and (b) [2003] (emphasis added).

Crown argues that despite the fact that products liability cases are commonly brought against manufacturers in jurisdictions other than where the product was designed or built, and despite West Virginia's settled venue-giving defendant principle, because Morris is a nonresident of West Virginia, Morris must show *separate acts by Crown that occurred in West Virginia* (*i.e.*, Morris must separately "establish venue" for Crown) before Morris can join Crown as a defendant along with Jefferds in Morris' suit in West Virginia.

In support of this argument, Crown points to language in *W. Va. Code*, 56-1-1(c)[2003] which would bar suit by a nonresident in West Virginia ". . . unless all or a substantial part of the acts or omissions giving rise to *the claim* asserted occurred in this state." Crown notes that *W.Va. Code*, 56-1-1(a)

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[8] The mandatory joinder rule of *W.Va.R.Civ.P.*, Rule 19(a) requires a plaintiff to join in one action all persons who are subject to service of process and in whose absence complete relief cannot be accorded among those already parties. Similarly, the permissive joinder rule of *W.Va.R.Civ.P.*, Rule 20, permits a plaintiff to join as defendants all persons whose liability arises "out of the same transaction, occurrence, or series of occurrences and if any question of law or fact common to all defendants will arise in the action." The goal of both mandatory and permissive joinder is the promotion of judicial economy by preventing both the duplication of effort and the uncertainty embodied in piecemeal litigation.

and (b) [2003] use the terms "cause of action" or "civil action" when saying that a case may be brought wherever one of the defendants is located, see discussion *supra* – while *W. Va. Code*, 56-1-1(c)[2003] uses the term "claim." Crown argues that Morris therefore must separately establish venue for his "claim" against Crown, by showing culpable "acts or omissions" by Crown that occurred in West Virginia.

A rule in accord with Crown's argument would run counter to established principles of joinder and judicial economy. Modern economies operate in complex, multi-jurisdictional networks of designers, manufacturers, distributors, retailers, purchasers, and users. When reasonably possible, legal claims involving these sorts of parties that arise from particular incidents and injuries involving a product should be resolved in a unitary forum.

As this Court recently stated in *Charleston Area Medical Center, Inc. v. Parke-Davis*, 217 W. Va. 15, 21, 614 S.E.2d 15, 21 (2005), quoting *Board of Ed. v. Zando, et. al.*, 182 W.Va. 597, 603-604, 390 S.E. 2d 796, 802-803:

> [t]he fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice–to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts.

In the instant case, where a substantial part of the culpable acts or omissions of one joint tortfeasor (Jefferds) are alleged to have occurred in West Virginia, and where the culpable acts or omissions of a second joint tortfeasor (Crown) are alleged to have occurred outside West Virginia, a requirement that the plaintiff independently "establish venue" with respect to the out-of-state tortfeasor would effectively

prevent joinder of the out-of-state tortfeasor. This would be an absurd result, contrary to all established procedure.

Additionally, Crown's assertion that the statute's use of the word "claim" supports Crown's argument is not well-founded. *Black's Law Dictionary, Centennial Edition,* 6th Ed. 1990, defines the term "claim," *inter alia*, as "[a] cause of action." In *Barker v. Traders Bank*, 152 W.Va. 774, 780, 166 S.E.2d 331, 335 (1969), this Court stated that "Rule 8(a), R.C.P., contemplates a succinct *complaint* containing a plain statement of *the* nature of *the claim* together with a demand for judgment." (Emphasis added). *Cf. Sticklen v. Kittle*, 168 W.Va. 147, 162, 287 S.E.2d 148, 156 (1981) (equating "claim" and "complaint")

There is certainly a sufficient overlap and identity between the ordinary meaning of the terms "claim," "civil action," and "cause of action," as they are used in *W. Va. Code*, 56-1-1 [2003] so as to weigh against finding that the use of the word "claim" in *W. Va. Code*, 56-1-1(c)[2003] establishes a novel rule that would fragment cases, foster piecemeal litigation, and radically alter settled procedures.

Additionally, Crown's suggestion that such a rule should be applied only to nonresidents runs headlong into the foregoing-discussed constitutional principles that strongly disfavor discrimination on the basis of residency in access to the courts. Application of these principles further weighs against such a reading of the statutory language.

For these reasons, this Court will not derive such an intent from the statute's use of the word "claim," nor enforce such a rule. Following our settled law, we hold that *W. Va. Code*, 56-1-1(c) [2003] does not require a nonresident plaintiff to separately establish venue for each defendant.

Based on this holding, the circuit court's dismissal of Crown as a defendant must be reversed.

IV.
Conclusion

The circuit court's dismissal of the plaintiff's claims against the appellants is reversed and this case is remanded.

Reversed and Remanded.

Maynard, Justice, dissenting:

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I would have affirmed the circuit court's dismissal of the appellant's lawsuit because I do not believe that a construction of W.Va. Code § 56-1-1(c) that prevents the appellant from bringing his action in Kanawha County violates the Privileges and Immunities Clause.

In *Douglas v. New Haven R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929), the Supreme Court considered the constitutionality of a New York statute that provided:

> An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; . . . . 4. Where a foreign corporation is doing business within this State.

279 U.S. at 386, 49 S.Ct. 355. The plaintiff's injuries in *Douglas* were inflicted in Connecticut where the plaintiff was a citizen and resident, and the defendant was a Connecticut corporation which did business in New York. The plaintiff brought her suit in New York, and the trial court dismissed it under the above statute. The New York appellate courts upheld the dismissal.

On appeal to the Supreme Court, the plaintiff argued that the statute as construed by the trial court "makes a discrimination between citizens of New York and citizens of other States, because it authorizes the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York." 279 U.S. at 386, 49

S.Ct. at 356. The Supreme Court rejected this argument and affirmed the dismissal. The Court explained:

> It is said that a citizen of New York is a resident of New York wherever he may be living in fact, and thus that all citizens of New York can bring these actions, whereas citizens of other States can not unless they are actually living in the State. But however often the word resident may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship, there is nothing to prohibit the legislature from using "resident" in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality we presume that the Courts of New York would construe it in that way; as indeed the Supreme Court has done already in so many words.
>
> * * * *
>
> Construed as it has been, and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between nonresidents with regard to these foreign causes of action. . . . There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

279 U.S. at 386-387, 49 S.Ct. at 356 (citations omitted); *see also State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4, 71 S.Ct. 1, 2-3, 95 L.Ed. 3 (1950) (indicating that "if a State chooses to prefer residents in access to often overcrowded Courts and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control").

Douglas was relied upon by the Oklahoma Supreme Court in the case of *St. Louis-San Francisco Ry. Co. v. Superior Court*, 276 P.2d 773 (1954). In that case, the Court was presented with the issue "whether a . . . court of this state can, because of inconvenience to court and parties, dismiss an action brought by a non-resident plaintiff against a foreign corporation on a cause of action arising outside this state." 276 P.2d at 775. In answering this question in the affirmative, the Court, citing *Douglas,* explained:

> [A] state may not, by reason of the privileges and immunities clauses of the federal Constitution, allow suits in its courts by its own non-resident citizens for liability arising out of conduct outside that state and discriminatorily deny access to its courts to a non-resident who is a citizen of another state. But if a state chooses to prefer residents in access to often over-crowded courts to deny such access to all non-residents, whether its own citizens or those of other states, it is a choice within its own control.

276 P.2d at 777.[1]

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[1] The majority indicates in footnote 2 of its opinion that there is no distinction for purposes of the Privileges and Immunities Clause between discrimination on the basis of residency and discrimination on the basis of citizenship. It should be noted that my construction of the statute at issue makes no such distinction. Rather, it treats all nonresidents, both

I would construe W.Va. Code § 56-1-1(c) to apply to all nonresidents, both citizens and noncitizens of West Virginia. In other words, this statute would also prevent a West Virginia citizen who is residing in Ohio for the purpose of employment and who is injured in Ohio by machinery manufactured by a West Virginia company from suing that company in West Virginia. Such a construction, according to the law set forth above, would not offend the Privileges and Immunities Clause.

W.Va. Code 56-1-1(c) serves an important purpose. Specifically, it is designed to give the residents of this State, who after all pay for our courts, ready access to them when needed. This can be effectively achieved only by preventing nonresidents from abusing our courts by flooding them with litigation, not because they do not have a forum elsewhere, but simply because they believe they may achieve a better result here. For example, in the case of *Grimmett v. CSX Transportation, Inc.*, which was recently referred to the Mass Litigation Panel, approximately 71 out of 79 plaintiffs are nonresidents of West Virginia. In fact, these plaintiffs were involved in actions that were originally filed in Gwinnett County, Georgia. These nonresident plaintiffs who may have very legitimate claims are nevertheless expending the time and limited resources of our State court system, to the detriment of resident plaintiffs, when their claims could have been brought elsewhere. Unfortunately, the majority opinion eviscerates a statutory safeguard against this type of abuse.

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citizens and noncitizens, the same for the purpose of applying W.Va. Code § 56-1-1(c).

Accordingly, for the reasons stated above, I dissent.[2]

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[2] South Carolina has a similar provision in its venue statute concerning foreign corporations as defendants. According to S.C. Code Ann. § 15-5-150 (1976),

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court; . . . (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

Benjamin, Justice,
concurring in result only:

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I agree with the majority's decision to reverse the trial court's dismissal of this matter and remand the case for further proceedings. I do so, however, not upon the constitutional analysis invoked by the majority, but upon far simpler grounds. In my opinion, the plain terms of W. Va. Code § 56-1-1(c) (2003), require reversal of the trial court's dismissal of this action and a remand to resolve the factual question of whether "all or a substantial part of the acts or omissions giving rise to the claim occurred in this state" based upon the allegations contained in the amended complaint and upon Jefferds Corporation's ["Jefferd"'s] status as a West Virginia corporation.[1] If a factual basis is confirmed for Morris' allegations regarding Jefferds' West Virginia operations and acts related to his claim, venue is proper in West Virginia pursuant to W. Va. Code § 56-1-1(c) (2003). Thus, resolution of this matter does not now necessitate addressing the constitutionality of West Virginia's venue statute.

This Court has repeatedly stated that it will avoid invalidating a statute on constitutional grounds where reasonably possible. In 1965, this Court held that:

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[1] As referenced in n. 4, *supra*, of the majority's opinion, it is not readily apparent from the record why Morris' motion to amend his pleadings was denied. Rule 15(a) of Rules of Civil Procedure provides that leave to amend shall be freely given when justice requires. However, trial courts should also insure that parties not abuse our Rules with fraudulent or deliberately exaggerated pleadings. In such cases, it is expected that trial courts will use the full panoply of sanctions available, beginning with Rule 11 of the West Virginia Rules of Civil Procedure.

> [i]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. Pt. 1, *State ex rel Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965); *see also,* Syl. Pt. 2, *State ex rel Riley v. Rudloff*, 212 W. Va. 767, 575 S.E.2d 377 (2002) (quoting *Gainer).* Indeed, "[t]he well settled general rule is that in cases of doubt the intent of the Legislature not to exceed its constitutional powers is to be presumed and the courts are required to favor the construction which would consider a statute to be a general law." Syl. Pt. 8, *State ex rel Heck's Inc. v. Gates,* 149 W. Va. 421, 141 S.E.2d 369 (1965). More recently, this Court summarized its duty in addressing the constitutionality of statutes by stating:

> Only when it can be said beyond a reasonable doubt that a law violates the Constitution of this State will we invalidate a legislative enactment on constitutional grounds. Thus, [w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to

> sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment. In this regard, [c]ourts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law.

Carvey v. State Bd. of Educ., 206 W. Va. 720, 727, 527 S.E.2d 831, 838 (1999) (internal quotations and citations omitted). This mandated exercise of judicial restraint in addressing a challenge to the constitutionality of legislation should have, in my opinion, resulted in the majority resolving this matter through application of plain statutory language. Morris' appeal of the dismissal of his lawsuit may properly be resolved by applying the plain language of W. Va. Code § 56-1-1, without addressing the constitutionality of W. Va. Code § 56-1-1(c).

Morris brought his product liability suit against Crown Equipment, an Ohio corporation and the manufacturer of the forklift at issue, and Jefferds, a *West Virginia* corporation and the forklift's distributor/seller and maintenance service provider. Pursuant to our venue statute, a civil action may be brought against a West Virginia corporation in any county where its principle office is located or where its president or chief officer resides. W. Va. Code § 56-1-1 (a)(2).[2] Morris

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[2] W.Va. Code § 56-1-1(a)(2) provides:

> Any civil action or other proceeding, except where it is otherwise specifically provided, may hereafter be brought in the circuit court of any county:
>
> . . .

alleged in his complaint that Jefferds' principle office was located in Kanawha County, the county in which he filed his lawsuit. Jefferds denies in its brief before this Court that its principle office is located in Kanawha County. However, in its order of November 24, 2004, the circuit court found that Jefferds' "officers" live in Kanawha County. Without resolving the conflict regarding the location of Jefferds' principle office in Kanawha County, the trial court's finding regarding Jefferds' officers' residence demonstrates venue was properly established in Kanawha County, as to Jefferds, pursuant to W. Va. Code § 56-1-1 (a) (2).

The circuit court, however, dismissed Morris's suit due to the 2003 enactment of W. Va. Code § 56-1-1(c), which provides, in relevant part, that "a nonresident of the state may not bring an action in a court of this state unless all or a

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> If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management[.]

Under this statutory provision, venue is proper in any county where a corporate defendant's principle place of business is located. Where a West Virginia corporation has its principle place of business in another state, our venue statute then imposes a secondary requirement that the cause of action arose in this state for the establishment of proper venue. As Jefferds is a West Virginia corporation with its principle place of business in West Virginia, Morris was not, under this statutory provision, also required to demonstrate that his cause of action against Jefferds arose in West Virginia.

substantial part of the acts or omissions giving rise to the claim asserted occurred in this state[.]" Finding Morris was a resident of Virginia and the forklift accident at issue occurred in Virginia, the circuit court found that Kanawha County, West Virginia, was an improper venue for Morris' claims against Jefferds. The circuit court's order reflected that it considered the allegations against Jefferds contained in Morris' proposed amended complaint, although the circuit court did not permit the amendment of Morris' complaint.

In the proposed amended complaint, Morris set forth numerous allegations of conduct occurring in West Virginia giving rise to his claims against Jefferds.[3] If true, these allegations may indeed satisfy W. Va. Code § 56-1-1(c)'s requirement that "all or a substantial part" of the acts underlying Morris' claims against Jefferds occurred in West Virginia. In my opinion, the circuit court prematurely dismissed Morris' claims. Morris should have been given the opportunity to conduct limited discovery on the venue issue. If discovery revealed that "all or a substantial part" of Jefferds' acts or omissions occurred in West Virginia, as alleged, venue is proper in Kanawha County, Therefore, I would reverse and remand this matter for the purpose of conducting limited discovery to resolve the crucial factual dispute as to whether the requirements of W. Va. Code § 56-1-1(c) are met in this matter. Fundamental fairness requires more than a resident defendant's mere denial of a non-resident's allegation of proper venue and the factual allegations supporting such venue before access to our courts is denied under W. Va. Code § 56-1-1(c). If Morris were able, upon remand, to properly establish venue as to Jefferds, a West Virginia corporation, in Kanawha County, he likewise establishes proper venue for his entire lawsuit.[4] The majority, however, has relieved Morris of

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[3] *See, supra,* n.4, majority opinion.

[4] As noted by the majority, West Virginia follows the venue-giving defendant principle which provides that once venue is established for one defendant, it is proper for all defendants. While W. Va. Code §56-1-1(c)

this obligation by simply invalidating W. Va. Code § 56-1-1(c).

As noted above, I do not believe that the proper resolution of this appeal requires this Court to address the constitutionality of W. Va. Code § 56-1-1(c). However, because the majority hinges its opinion in this case on the constitutionality of this non-resident venue statute, some observations regarding this statute are appropriate in light of Article IV, Section 2 of the Constitution of the United States, the Privileges and Immunities Clause.[5]

Contrary to the majority's suggestion, the Privileges and Immunities Clause does not categorically bar distinctions based upon residency for venue purposes. In *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4, 71 S.Ct. 1, 95 L.Ed. 3 (1950), Justice Frankfurter recognized that under:

> the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, s 2. Therefore Missouri cannot allow suits by nonresident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a non-resident who is a citizen of another State. *But if a State chooses to '(prefer) residents in access to often overcrowded Courts' and to deny such access*

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requires that each plaintiff independently establish proper venue, it is silent as to independent defendants, a point recognized in the majority opinion at Syllabus Point 3, *supra.* Since the Legislature has not addressed the issue of individual defendant venue, that issue is not now before this Court.

[5] The Privileges and Immunities Clause provides, in pertinent part, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

> *to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control.*

(Emphasis added.) In *Mayfield*, Justice Frankfurter relied upon Justice Holmes's similar opinion in *Douglas v. New Haven Ry. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929), for the proposition that a state may preclude non-residents from filing claims in state courts without violating the Privileges and Immunities Clause in certain circumstances. In *Douglas*, Justice Holmes, writing for the Court, noted:

> A distinction of privileges according to residence may be based upon rational considerations[.]...There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

Douglas, 279 U.S. at 387.[6]

In both *Mayfield* and *Douglas*, the United States Supreme Court recognized that the need to address an overcrowded court system may be a legitimate, rational basis for discriminating between residents' and non-residents' access to a state court. So long as the West Virginia Legislature provides such a rational basis for discriminating between residents and non-residents when enacting, or revising, a venue statute which prohibits certain suits from being filed in this State by non-

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[6] In *Douglas*, the Court upheld the constitutionality of a New York statute which provided that "[a]n action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; ... 4. Where a foreign corporation is doing business within this State." *Id.* at 386. In so doing, the Court rejected an argument that the statute violated the Privileges and Immunities clause by discriminating between citizens of New York and other states by authorizing the dismissal of suits filed by non-citizens of New York but not of those filed by New York citizens.

residents, it arguably should withstand constitutional scrutiny under the Privileges and Immunities Clause.

Overcrowding of West Virginia courts caused by numerous suits filed by nonresidents against foreign corporations has long been a perceived problem in this State. The Legislature's enactment of W. Va Code § 56-1-1(c) in 2003 was perhaps an effort to address this problem. However, because the Legislature failed to articulate a proper rational basis for discriminating between residents and non-residents for purposes of establishing venue in our courts, this Court cannot now, recognizing the limitations of our Constitutional charge, speculate as to the Legislature's intentions. Without such a proper rational basis for enacting a seemingly discriminatory venue statute, a court left to speculate as to both proper and improper rationales for residency discrimination cannot rightly guess in favor of one possible rationale any more than it can in favor of another.[7]

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[7] The Legislature might consider setting forth its findings relating to the need for a discriminatory venue section, such as W. Va. Code §56-1-1(c), should it choose to further consider such a venue section in the future.

Albright, J., concurring:

FILED
July 12, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF
APPEALS OF
WEST VIRGINIA

I concur with the reasoning and conclusions in this Court's majority opinion in the instant case. I write separately to amplify several of the points made in that opinion.

A.

The venue provisions of *W.Va. Code*, 56-1-1(c)[2003] that are at issue in the instant case address the ability of a court that has jurisdiction over the person(s) and subject matter of a case to nevertheless abstain from the exercise of that jurisdiction, on venue grounds, when another court is available and more appropriate. The doctrine that permits such an abstention – which can apply in both intrastate and interstate contexts – is known as *forum non conveniens*.[1]

In the interstate application of the *forum non conveniens* doctrine, "the state announcing such a policy disclaims any interest in providing a forum for litigation within the scope of the policy, *i. e.*, litigation between foreigners on causes of action predicated on the laws of another state." Carrie and Schechter, "Unconstitutional

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[1] In their briefs, the parties to the instant case agree that *W.Va. Code*, 56-1-1(c) [2003] addresses *forum non conveniens* principles and procedures in an interstate context, just as earlier parts of the statute address these principles and procedures in an intrastate context. *See State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995). In Syllabus Point 1 of *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co.* 194 W.Va. 203, 460 S.E. 2d 18 (1954) we stated:

> The common law doctrine of forum non conveniens is simply that a court may, in its sound discretion, decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute.

Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale Law Journal 1323, 1383 (1960).

A number of courts and commentators have discussed the effect of the Privileges and Immunities Clause of the *United States Constitution* on the exercise of the doctrine of *forum non conveniens:*

> . . . [w]e perceive no reason why the doctrine [*forum non conveniens*] should not be available in this State, upon a proper showing and *without discrimination against either noncitizens of California* or against FELA cases.

Price v. Atchison, T. & S. F. Ry. Co., 42 Cal.2d 577, 581, 583, 268 P.2d 457, 460 (1954) (emphasis added).

> . . . [t]he application of the doctrine [*forum non conveniens*] so as to refuse jurisdiction in an action brought by a citizen of another state will not violate Article 4 *if jurisdiction would also have been refused had the plaintiff been a citizen of the forum state.*

Zurick v. Inman, 221 Tenn. 393, 399, 426 S.W.2d 767, 770 (1968) (emphasis added).

> . . . [M]any courts have followed the general rule that applying the doctrine of forum non conveniens to refuse jurisdiction in an action brought by a citizen of a foreign state does not violate the Privileges and Immunities Clause if jurisdiction would be refused in an action brought by a citizen of the forum state in the same circumstances. A particular state may apply the doctrine of *forum non conveniens, as*

> *long as it is applied to citizens and noncitizens alike.*

Owens Corning v. Carter, 997 S.W.2d 560, 569 (Tex. 1999) (footnote omitted) (emphasis added).

> However, the doctrine [of *forum non conveniens*], as we construe it, is *non-discriminatory* and does not turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residents and citizens as well as for and against foreign residents and citizens.

Gore v. U S. Steel Corp., 15 NJ. 301, 311, 104 A.2d 670, 675-676 (1954) (emphasis added).

> A state that restricts forum non conveniens to cases involving plaintiffs from other states may run afoul of the Privileges and Immunities Clause of the U.S. Constitution.

Note, "Georgia On the Nonresident Plaintiff's Mind," 36 Ga. L. Rev. 1109, 1142 n.243, (2002).[2]

In *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 234-235, 400 S.E.2d 239, 242-243 (1990), this Court stated:

> A number of other courts have reached the same conclusion that the common law doctrine

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[2] *See also Adkins v. Underwood*, 520 F.2d 890 (7th Cir. 1975) (Illinois Supreme Court did not violate the privileges and immunities clause in view of apparent well-established policy of Illinois courts of allowing nonresident access to Illinois courts and of evenhanded application of *forum non conveniens* doctrine).

> of *forum non conveniens* can be utilized to deny access to courts to nonresident plaintiffs in FELA cases *in appropriate circumstances* without running afoul of the Privileges and Immunities Clause.
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> * * *
>
> . . . no one factor [is] necessarily dispositive in a *forum non conveniens* analysis and ... the doctrine [has] to be applied flexibly on a case-by-case basis [citing *Piper Aircraft v. Reyno,* 454 U.S. 235, 102, S.Ct. 252, 70 L. Ed. 2d 419 (1991).]

(Emphasis added.)[3]

Based on the foregoing authority (and the authority cited in the majority opinion), it appears that in applying a *forum non conveniens* venue statute like *W. Va. Code,* 56-1-1(c) [2002], it is constitutionally permissible to *take into account* the residency or citizenship of the plaintiff, along with other appropriate factors. However, it is constitutionally impermissible to treat nonresidency in or noncitizenship of

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[3] Am. Jur.2d, Constitutional Law, Sec. 769 [2006] states:

> Insofar as such is not prohibited by the Privileges and Immunities Clause, the fact that the parties to an action are noncitizens or nonresidents of the state *may be taken into consideration* by a court in determining whether to apply the doctrine of forum non conveniens, and the application of such doctrine so as to refuse to exercise jurisdiction in an action brought by a citizen of an American sister state is not repugnant to the Privileges and Immunities Clause if, under the particular circumstances, the exercise of jurisdiction would have been refused had the plaintiff been a citizen of the forum state . . . [emphasis added].

"The Supreme Court has permitted nonresidence *to be taken into account* in granting forum non conveniens dismissals[,]" Michael Hoffheimer, "Mississippi Conflicts of Law," 67 Miss. L.J. 175, 321 (1997) (emphasis added).

West Virginia as a *categorical* ground requiring the courts of West Virginia to dismiss a case on the basis of *forum non conveniens,* without regard to other factors that may be relevant. And of course, the *forum non conveniens* principles simply do not apply where the defendant is a West Virginia entity or the cause of action arose in West Virginia.

B.

This Court's opinion in the instant case correctly concludes that our decision in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995) cannot and does not diminish this Court's duty to assure that all venue-related statutory language is read and applied in a constitutional fashion.

Notably, the *Riffle* opinion did not mention *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 232, 366 S.E.2d 738, 740 (1988), which states:

> Procedural statutes relating to venue, like West Virginia Code § 56-1-1, are effective only as rules of court and are subject to modification, suspension or annulment by rules of procedure promulgated by this Court. *W. Va. Const.* art. 8, § 3; *W.Va. Code* § 51-1-4 (1981 Replacement Vol.); *W.Va. Code* § 51-1-4a (1981 Replacement Vol.). Ultimately, civil venue questions are governed by the procedural rules promulgated by this Court, the procedural statutes that are not inconsistent with those procedural rules, and the opinions issued by this Court interpreting those procedural rules and statutes. [Footnote omitted].[4]

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[4] *See also Hinchman v. Gillette*, 217 W.Va. 378, 391, 618 S.E.2d 387, 400 (2005) (Davis, J., concurring) (procedural statutes are effective only as rules of court and are subject to modification, suspension, or annulment by rules of procedure promulgated by this Court).

Applying this settled principle, this Court recently held that statutory "provisions ... [were] enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as they address procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution." Syllabus Point 3, in part, *Louk v. Cormier,* 218 W.Va. 81, 622 S.E.2d 788 (2005).

In *Louk*, we stated:

> This Court has made clear that "[t]he legislative, executive, and judicial powers . . . are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the [judicial], legislative or executive department, the lawful exercise of that discretion cannot be controlled by the [others]." *Danielley v. City of Princeton*, 113 W.Va. 252, 255, 167 S.E. 620, 622 (1933). Promulgation of rules governing litigation in the courts of this State rests exclusively with this Court.

Id., 218 W.Va. at ___, 622 S.E.2d at 800.[5]

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[5] *See also* Syllabus Point 1, *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977) ("Under Article VIII, Section 8 of the Constitution of West Virginia . . . administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); *Williams v. Cummings,* 191 W.Va. 370, 372, 445 S.E.2d 757, 759 (1994) ("This statute . . . is in conflict with and superseded by T.C.R. XVII, which addresses the disqualification and temporary assignment of judges, and thereby dispenses with [the statute] . . .;" *Meadows on Behalf of Professional Employees of West Virginia Educ. Ass'n v. Hey*, 184 W.Va.

Therefore, it is clear that the Separation of Powers Clause, Art. V, Sec. 1 of the *West Virginia Constitution*, authorizes the substantive review and limitation of statutes in the areas of venue and *forum non conveniens* by the supreme court of appeals insofar as the statutes (1) address procedural litigation matters that are regulated exclusively by the supreme court of appeals pursuant to the Rule-Making Clause, Article VIII, Sec. 3 of the West Virginia Constitution; or (2) present other constitutional concerns.

C.

Finally, it should be noted that the result in each of the cases relied upon by the dissenting opinion in the instant case turns and relies on a purported distinction between non-residents and non-citizens, in applying the Privileges and Immunities Clause. The dissent replicates that distinction by finding that the application of *W.Va. Code*, 56-1-1(c) [2002] in the instant case to dismiss Mr. Morris' case is constitutionally permissible, because this West Virginia statute facially applies to both citizen and non-citizen "nonresidents."[6]

As this Court's opinion makes clear at note 2, the notion that there is a substantial and dispositive constitutional distinction between discrimination on the basis of residency and discrimination on the basis of citizenship has been set aside by a series of decisions by the United States Supreme Court. Authority grounded in this obsolete distinction is

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75, 79 n.4, 399 S.E.2d 657 n.4 (1990) ("We note that the procedural statutes relating to venue are effective only as rules of court and subject to modification, suspension, or annulment by rules of procedure promulgated by the Supreme Court.") (citation omitted).

[6] The thoughtful concurrence by Justice Benjamin also cites to *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4, 71 S.Ct. 1, 95 L.Ed. 3 (1950), a case that turns on a distinction between discrimination against "citizens" of other states and discrimination against "residents" of other states.

therefore fairly unpersuasive; and it seems that any discriminatory scheme, whether against non-residents or non-citizens, is of constitutional dimension and must be measured against a standard higher than a "rational basis." A court's ability to "take into account" the residency of a plaintiff in a true *forum non conveniens* situation, which I believe is permissible, is more respecting of the constitutional values at stake than any categorical discrimination.

Accordingly, I concur with this Court's opinion and judgment.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

CIVIL ACTION NO. 04-C-1174

CROWN EQUIPMENT CORP.,
a foreign corporation and
JEFFERDS CORP. D/B/A HOMESTEAD MATERIALS HANDLING COMPANY,
a West Virginia corporation,

Defendants.

FILED
2004 SEP-1 PM 1:04
CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER

Came this 1st day of September, 2004, Crown Equipment Corp. ("Crown"), by its counsel, Michael J. Farrell and Farrell, Farrell & Farrell, L.C. and came also plaintiff by Thomas W. Pettit and presented oral argument in support of its Motion to Dismiss for Lack of Venue. The Motion was filed pursuant to Rule 12(b)(3), West Virginia Rules of Civil Procedure and West Virginia Code 56-1-1(c).

The Court has considered the argument of counsel at the Hearing on this Motion, the applicable law as well as the allegations in the Complaint, proposed Amended Complaint, and the statements in Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss and Crown's Motion for a Protective Order and Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and Crown's Motion for a Protective Order.

Findings of Fact

1. This civil action was filed after June 4, 2003.

2. At all relevant times, plaintiff is and has been a resident of Virginia.

3. The injury which gives rise to this cause of action occurred in Virginia.

4. Crown is an Ohio corporation with its principal place of business in Ohio.

5. Neither the Complaint nor the proposed Amended Complaint allege that Crown engaged in any acts or omissions within the State of West Virginia which gave rise to the claim.

6. None of the acts or omissions alleged by plaintiff against Crown occurred in the state of West Virginia.

7. There are no facts plead in the Complaint and proposed Amended Complaint that Crown is not subject to jurisdiction within the state of Virginia for the alleged acts or omissions which give rise to plaintiff's cause of action.

8. Plaintiff did not file an affidavit with the Complaint or the proposed Amended Complaint that such action cannot be maintained in Virginia due to the lack of any legal basis to obtain personal jurisdiction over Crown.

Conclusions of Law

1. West Virginia Code 56-1-1(c) is applicable to all civil actions filed after June 4, 2003.

2. Because this civil action was filed after June 4, 2003, the applicable venue statute is West Virginia Code 56-1-1(c).

3. Plaintiff is a non-resident of the state of West Virginia as contemplated by West Virginia Code 56-1-1(c).

4. Even if the business contacts of a defendant with the state of West Virginia was relevant to a cause of action filed by a non-resident of West Virginia, the principal place of business for Crown is Ohio, not West Virginia.

5. West Virginia Code 56-1-1(c) does consider whether the alleged injurious acts or omissions by a defendant occurred within the state of West Virginia. Significantly, plaintiff makes no allegation that any injurious act or omission by Crown occurred in West Virginia.

6. Because there are no allegations in the Complaint or proposed Amended Complaint that all or a substantial part of the acts or omissions attributed to Crown occurred in the state of West Virginia, there is no venue in the Circuit Court of Kanawha County, West Virginia for this non-resident plaintiff to pursue a cause of action against Crown as contemplated by West Virginia Code 56-1-1(c).

7. Venue in the Circuit Court of Kanawha County, West Virginia must be established against each defendant on the face of the Complaint or the proposed Amended Complaint.

8. Venue in the Circuit Court of Kanawha County, West Virginia is not established as to Crown on the face of the Complaint or the proposed Amended Complaint.

9. Venue for civil litigation in West Virginia is defined by statute.

10. The allegations in the Complaint and proposed Amended Complaint provide no factual or legal basis to disregard the deliberate choice by the West Virginia Legislature to exercise its right to define the venue for the Circuit Courts of this state as set forth in West Virginia Code 56-1-1(c).

11. West Virginia Code 56-1-1(c) expressly provides that dismissal in this circumstance is without prejudice to re-filing in a court in any other state or jurisdiction.

12. The Motion to Dismiss by Crown, based on Rule 12(b)(3), W.Va. R. Civ. Proc. And West Virginia Code 56-1-1(c), is ripe for decision.

13. Both West Virginia Code 56-1-1(c) and Rule 12 (b) (3), W. Va. R. Civ. Proc. Expressly provide that

dismissal is the proper remedy when venue is not proper as to a non-resident plaintiff.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that:

1. All claims and causes of action asserted against Crown Equipment Corp. be and are hereby **DISMISSED WITHOUT PREJUDICE** to re-filing in a court in any other state or jurisdiction as provided by West Virginia Code 56-1-1(c).

2. The Clerk of Court shall provide a *teste* copy of this Order to counsel of record as follows:

Thomas W. Pettit, Esquire
Thomas W. Pettit, L.C.
Post Office Box 189
Barboursville, West Virginia 25504

Michael J. Farrell, Esq.
Robert L. Hogan, Esq.
Farrell, Farrell & Farrell
Post Office Box 6457
Huntington, West Virginia 25772-6457

Thomas J. Cullen, Esq.
Adam T. Sampson, Esq.
Goodell, DeVries, Leech & Dann
One South Street, 20th Floor
Baltimore, Maryland 21202

Lawrence E. Morhous, Esq.
Brewster, Morhous, Cameron, Mullins, Caruth, Moore, Kersey & Stafford
Post Office Box 529
Bluefield, West Virginia 24701

3. The objections and exceptions of plaintiff are noted and preserved.

ENTERED:

s/Tod J. Kaufman
Tod J. Kaufman
Judge

DATED: September 1, 2004

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1 DAY OF SEPTEMBER 2004.
s/Cathy s. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST
VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

v. CIVIL ACTION NO. 04-C-1174
(Judge Tod J. Kaufman)

CROWN EQUIPMENT CORP., a
foreign corporation; and JEFFERDS
CORP., d/b/a HOMESTEAD
MATERIALS HANDLING COMPANY,
a West Virginia corporation,

Defendants.

FILED
2004 NOV 24 PM 1:17

CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER

On the 1st day of September, 2004, and on the 12th day of November, 2004, came Jefferds Corp. by its counsel, Lawrence E. Morhous, and also came plaintiff by his counsel, Thomas W. Pettit, and presented oral argument on Jefferds Corp.'s motion to dismiss for lack of venue filed pursuant to Rule 12(b)(3), West Virginia Rules of Civil Procedure and West Virginia Code §56-1--1(c) and plaintiff's response to that motion coupled with his motion to amend his complaint.

The Court, having considered the argument of counsel on the motions, the applicable law, the allegations in plaintiff's complaint and proposed amended complaint, plaintiff's response to that motion, and the affidavit in support

of the dismissal motion filed by Jefferds Corp., does rule as follows:

Findings of Fact

1. That this civil action was filed after June 4, 2003.

2. That at all times relevant to this action, plaintiff is and has been a resident of the Commonwealth of Virginia.

3. That the injury giving rise to this action occurred in the Commonwealth of Virginia.

4. That even though Jefferds Corp. is a West Virginia corporation and some of its officers may reside in Kanawha County, plaintiff has failed to produce any fact to establish that "all or a substantial part of **(any) acts or omissions giving rise to (plaintiff's) claim**" (emphasis added) occurred within the State of West Virginia as mandated by Code §56-1--1(c).

5. That plaintiff did not file an affidavit with his complaint, his proposed amended complaint, or otherwise to demonstrate that his claims could not be maintained in Virginia due to the lack of any legal basis to obtain personal jurisdiction over Jefferds Corp. as required in situations of this nature by Code §56-1--1(c).

Conclusions of Law

1. That venue for civil litigation in West Virginia is defined by statute.

2. That West Virginia Code §56-1-1(c) is applicable to all civil actions filed after June 4, 2003.

3. That since this action was filed after June 4, 2003, the applicable venue statute is West Virginia Code §56-1-1(c).

4. That plaintiff is a non-resident of the state of West Virginia as contemplated by West Virginia Code §56-1-1(c).

5. That West Virginia Code §56-1-1(c) does not differentiate as to whether a domestic or foreign entity is accused of injurious acts or omissions by a plaintiff but instead that statute requires that all or a substantial part of any such acts or omissions occur within the state of West Virginia and, more pertinent to this action, that such acts or omissions must have given rise to plaintiff's claims and thus neither the residency of the officers of Jefferds Corp. in West Virginia nor that company's operation of branch facilities in different states including Virginia and West Virginia as argued by plaintiff's counsel in opposition to Jefferds Corp.'s dismissal motion is not relevant to a determination of proper venue under that statute.

6. That because there is a complete absence of any proof that all or a substantial part of any acts or omissions giving rise to plaintiff's claims against Jefferds Corp. in this action occurred in the state of West Virginia and there being no credible proof presented by plaintiff to rebut any of the assertions set forth in the affidavit of J. David Sorrells submitted in support of Jefferds Corp.'s dismissal motion, there is no venue in this Court.

7. That plaintiff's allegations in his complaint and proposed amended complaint provide no factual or legal basis to disregard the deliberate choice by the West Virginia Legislature to exercise its right to define the venue for the Circuit Courts of this state as set forth in West Virginia Code §56-1-1(c) so as to protect not only those Courts but also the citizens of this State, including corporations such as Jefferds Corp. from claims of non-resident plaintiffs

8. That West Virginia Code §56-1-1(c) expressly provides that a dismissal in this circumstance must be without prejudice to the re-filing of a plaintiff's claims in a court in any other state or jurisdiction.

9. That both West Virginia Code §56-1-1(c) and Rule 12(b)(3) of the West Virginia Rules of Civil Procedure provide that dismissal of a civil action is the appropriate remedy when venue is not proper.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that:

1. All claims and causes of action asserted by plaintiff against Jefferds Corp. be, and they hereby are, **DISMISSED BUT WITHOUT PREJUDICE** to plaintiff re-filing his claims in a court in any other state or jurisdiction as contemplated by West Virginia Code §56-1-1(c).

2. The objections and exceptions of plaintiff to the rulings in this Order are hereby noted and preserved.

THE CLERK IS HEREBY INSTRUCTED TO MAIL AN ATTESTED COPY OF THIS ORDER TO EACH OF THE UNDERSIGNED ATTORNEYS IMMEDIATELY FOLLOWING THE ENTRY HEREOF.

ENTER: This 24th day of November, 2004.

s/T.J. Kaufman
Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24 DAY OF NOVEMBER 2004.
s/ Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

v. Civil Action No. **04-C-1174**
Tod Kaufman, Circuit Judge

CROWN EQUIPMENT CORP., a foreign corporation; and JEFFERDS CORP. D/B/A HOMESTEAD MATERIALS HANDLING COMPANY, a West Virginia corporation,

Defendants.

FILED
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CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

On the 12th day of November, 2004, came the parties, by their respective counsel, for hearing upon *Plaintiff's Motion to Reconsider.*

Whereupon the Court, having reviewed the written submissions of the parties, heard the oral arguments of counsel as to *Plaintiff's Motion to Reconsider*, which the Court concludes should be treated as a motion filed pursuant to W.Va. R. Civ. P. Rule 59(e). Having fully considered the same, the Court is of the opinion that Plaintiff's Motion to Reconsider should be **DENIED**, based upon the following findings and conclusions.

In resolving *Plaintiff's Motion to Reconsider*, the Court adopts all findings and conclusions set forth in its *Order*

entered herein on September 1, 2004, as if fully restated herein. The Court further finds and concludes as follows.

1. West Virginia Code § 56-1-1(c) was enacted by an Act of the West Virginia Legislature in 2003.

2. The legislative history of Senate Bill No. 213 (2003), which lead to enactment of W.Va. Code § 56-1-1(c)(2003), indicates that he purpose of the Bill was "to preserve West Virginia courts for West Virginians and for non-residents who are injured in this state," a compelling state interest.

3. In passing Senate Bill No. 213, the Legislature is presumed to have known and understood the pre-existing W.Va. Code § 56-1-1. It may be further presumed that the Legislature "meant what it said" in the text of W.Va. Code § 56-1-1(c)(2003). *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, 585-86, 466 S.E.2d 424, 436-37 (1995).

4. Whereas paragraphs (a) and (b) of the pre-existing W.Va. Code § 56-1-1 reference terms such as "civil action" and "cause of action," W.Va. Code § 56-1-1(c)(2003) introduces a new, singular term, "claim"; i.e., ". . .unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." The Court therefore concludes that the Legislature intended that the term "claim," as used in W.Va. Code § 56-1-1(c), should have a different meaning than "cause of action" or "civil action."

5. The Court concludes that the use of the term "claim," when viewed in the context of the express purpose of W.Va. Code § 56-1-1(c), reflects the Legislature's intent that a non-resident of West Virginia who was not injured in West Virginia must establish venue as to each claim asserted, and consequently, as to each defendant against whom each claim is asserted. Had the Legislature's intent been otherwise, the Legislature would have expressly stated or used the same terminology found in W.Va. Code § 56-1-1, paragraphs (a) and (b).

6. The *West Virginia Rules of Civil Procedure* are not to be construed so as to extend or limit venue. W.Va. R. Civ. P. Rule 82. Consequently, the joinder rules set forth in W. Va. R. Civ. P. Rules 19 and 20 have no impact on the Court's determination of venue in this instance. Moreover, to the extent that the joinder rules may be intended to promote judicial economy and avoid piecemeal litigation, such goals would have been most appropriately pursued in this instance had the plaintiff prosecuted his claims in the courts of the Commonwealth of Virginia.

7. There is no conflict between W.Va. Code § 56-1-1(c) and W. Va. Code § 56-3-33(a)(4)-(5). The latter statute, which provides for "long-arm" jurisdiction, is applicable to injuries caused in West Virginia by conduct outside the State. In this instance, plaintiff's injuries occurred in Virginia, not West Virginia, and therefore, W.Va. Code § 56-3-33(a)(4)-(5) is inapplicable. Furthermore, jurisdiction and venue are distinct concepts, and each must be independently established by a plaintiff seeking to prosecute a claim against a defendant.

Therefore, for the reasons set forth above and in this Court's September 1, 2004 *Order* dismissing all claims against defendant Crown Equipment Corporation, without prejudice, it is accordingly **ORDERED** that *Plaintiff's Motion to Reconsider* shall be and is hereby **DENIED**.

There being no just reason for further delay in the disposition of plaintiff's claims against Crown, it is further **ORDERED** that the prior dismissal of claims against Crown, without prejudice, together with this denial of *Plaintiff's Motion to Reconsider*, shall constitute a **FINAL JUDGMENT** as between plaintiff and Crown, as contemplated by W.Va. R. Civ. P. Rule 54(e).

It is further **ORDERED** that the Clerk of Court shall provide a *teste* copy of this Order to counsel of record as follows:

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The objections and exceptions of plaintiff are noted and preserved.

ENTER: 11/29/04

s/Tod J. Kaufman
Tod J. Kaufman, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY

FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30th DAY OF NOVEMBER 2004.
s/ Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared for entry by:

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ANNOTATED CODE OF WEST VIRGINIA
CHAPTER 56. PLEADING AND
PRACTICE ARTICLE 1. VENUE

§56-1-1- **Venue generally**

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

(1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is;

(2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management;

(3) If it be to recover land or subject it to a debt, where the land or any part may be;

(4) If it be against one or more nonresidents of the state, where any one of them may be found and served with process or may have estate or debts due him or them;

(5) If it be to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

(6) If it be on behalf of the state in the name of the attorney general or otherwise, where the seat of government is; or

(7) If a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his or her court, the action or suit may be brought in any county in an adjoining circuit.

(b) Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

(c) Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this

state: *Provided,* That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident brining such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

In a civil action where more than on plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refilling in a court in any other state or jurisdiction.

Nos. 06-487, 06-503

IN THE

Supreme Court of the United States

JEFFERDS CORPORATION and
CROWN EQUIPMENT CORPORATION,
Petitioners,

v.

JEREMIAH "BART" MORRIS,
Respondent.

On Petition for a Writ of Certiorari to the
West Virginia Supreme Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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November 2006

QUESTION PRESENTED

Whether West Virginia's venue statute, W. Va. Code § 56-1-1, requires a West Virginia state court to decline to exercise jurisdiction over a case brought by a non-resident plaintiff against a West Virginia resident.

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STATEMENT OF THE CASE

While operating a forklift that went out of control, respondent Jeremiah "Bart" Morris suffered a severe injury that required amputation of his leg. Mr. Morris is a Virginia resident, and the incident occurred in Virginia.

Petitioner Jefferds Corporation ("Jefferds"), a West Virginia Corporation, is the distributor of the forklift and responsible for servicing the product. Petitioner Crown Equipment Company ("Crown"), an Ohio corporation, designed, manufactured, and distributed the forklift. Mr. Morris sued Petitioners in state court in West Virginia, where Jefferds is incorporated and has its principal place of business and where its officers reside. The complaint alleges negligence, strict liability, failure to warn, and breach of warranty.

Both Jefferds and Crown moved to dismiss for improper venue based on a West Virginia statute, W. Va. Code § 56-1-1(c) (2003), which, in pertinent part, provides: "[A] nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."

In response to the motions to dismiss, Mr. Morris argued that application of § 56-1-1(c) as urged by Petitioners would violate the Privileges and Immunities Clause of the United States Constitution, that their argument ran counter to the Open Courts Clause of the West Virginia Constitution, that venue was proper under W. Va. Code § 56-1-1(a) because Jefferds is a West Virginia corporation, and that venue was proper under § 56-1-1(c) because "a substantial part of the acts or omissions giving rise to the claim asserted occurred in" West Virginia. Mr. Morris also moved to amend his complaint and to take discovery limited to venue issues.

The trial court denied Mr. Morris's motions and granted Petitioners' motions to dismiss. Mr. Morris appealed to the

state Supreme Court of Appeals, which reversed and remanded the case to the trial court for proceedings on the merits. The court explained that a reading of W. Va. Code § 56-1-1(c) that "categorically immunize[d] a West Virginia defendant . . . from suit in West Virginia by a nonresident" would run afoul of the Privileges and Immunities Clause and "established West Virginia law." Jefferds App. 19. The court therefore gave a "narrow-breadth reading" to the state statute and held that § 56-1-1-(c) does not apply to civil actions filed against West Virginia citizens and residents, such as Jefferds. *Id.* 20-21. The court therefore did not reach the state constitutional issue. The court also did not decide whether "a substantial part of the acts or omissions involved" occurred in West Virginia, although the majority stated that "it seems clear that the plaintiff's Second Amended Complaint does sufficiently allege that a 'substantial' portion of the acts or omissions giving rise to Morris' claims occurred in West Virginia." *Id.* 11-12.[1]

In a concurrence, Justice Benjamin stated that the case should be remanded to resolve factual questions about "whether 'all or a substantial part of the acts or omissions giving rise to the claim occurred in'" West Virginia. *Id.* 31 (quoting § 56-1-19(c)); *see id.* 35 (same). He also stated that venue was proper under W. Va. Code § 56-1-1(a), based on the residence of Jefferds's officers. *Id.* 34. Justice Albright concurred to emphasize that residency may be taken into consideration along with other factors in a forum non conveniens context, but that

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[1]The court also held that, under state law, venue was proper as to petitioner Crown because "once venue is proper for one defendant, it is proper for all other defendants subject to process." Jefferds App. 22-25. Crown has not sought this Court's review of this state-law holding.

it should not be used as a "categorical ground requiring" dismissal. *Id.* 43. Justice Maynard dissented. *Id.* 26.

REASONS FOR DENYING THE WRIT

Review is unwarranted for four reasons. First, the court lacks jurisdiction because the state court decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a). Second, the decision below rests on independent state grounds. Third, there is no conflict among the state courts regarding the question presented here. Finally, the decision below is not inconsistent with this Court's jurisprudence.

A. This Court Lacks Jurisdiction To Review The Non-final Decision Below.

This Court's review of state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the ruling of the West Virginia Supreme Court of Appeals reversed the trial court's dismissal of the case and remanded the case for further proceedings. Jefferds App. 25. Thus, the decision below is not a "final judgment" within the meaning of § 1257.

This Court has identified four exceptions to § 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). As to the first three, this Court recognizes exceptions where (1) "the federal issue is conclusive or the outcome of further proceedings preordained," (2) the federal issue "will survive and require decision regardless of the outcome of further state court proceedings," and (3) "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 479-81; *see also Jefferson v. City of Tarrant*, 52 U.S. 75, 82 (1997). As to these three categories, the judgment involved here does not even arguably apply. If

Petitioners prevail in the trial court on remand, the question presented will no longer require decision. Thus, as in *Jefferson v. City of Tarrant*, "[t]he outcome of those further proceedings could moot the federal question" presented here. *Id.* at 78. On the other hand, if Petitioners do not prevail on remand, they "will be free to seek [Supreme Court] review when the state-court proceedings reach an end." *Id.*

The fourth *Cox Broadcasting* exception applies only when two requirements are met. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Cox Broadcasting*, 420 U.S. at 482-83.

For two reasons, this category is also inapplicable here. First, reversal of the state court decision below would not preclude further litigation on Mr. Morris's claims. As the state supreme court recognized, "it seems clear that [Mr. Morris's] Second Amended complaint does sufficiently allege that a 'substantial' portion of the acts or omissions giving rise to [his] claims occurred in West Virginia." *See* Jefferds App. 11-12 n.4. If the allegations of that complaint are correct, then venue is proper under § 56-1-1(c), regardless of the answer to the question presented in the petitions. *See also id.* 31, 35 (Benjamin, J., concurring) (case should be remanded to resolve factual question whether substantial part of acts or omissions giving rise to the claim occurred in West Virginia). Moreover, as concurring Justice Benjamin observed below, venue in this

case would also be proper under a different provision of the West Virginia Code, § 56-1-1(a), which provides for venue in the West Virginia county where the chief officer of a defendant-corporation resides. Jefferds App. 34; *see id.* at 19 (majority opinion, noting that Petitioners' argument contravenes W. Va. Code § 56-1-19a)).

Second, "refusal immediately to review the state-court decision" presents no risk of "seriously erod[ing] federal policy." No federal policy precludes West Virginia, or any state, from giving its venue statute the reading adopted by the court below. Indeed, Petitioners do not suggest—nor could they—that West Virginia's decision allowing a non-resident to sue a West Virginia resident in West Virginia state court runs afoul of any federal constitutional or statutory right or privilege. Defining the scope of § 56-1-1(c) is well within the province of the West Virginia Supreme Court of Appeals. Because there is no conceivable argument that the scope of that statute, as articulated in the opinion below, violates any federal policy, the fourth *Cox Broadcasting* exception does not confer jurisdiction on this Court here. *See Flynt v. Ohio*, 451 U.S. 619, 621 (1981) ("there is no identifiable federal policy that will suffer if the state . . . proceeding goes forward" in case presenting Equal Protection Clause question). *Compare Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (holding that to allow litigation to go forward where parties had contracted for arbitration might erode federal policy embodied in Federal Arbitration Act); *Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983) (holding that to allow case to go forward would risk eroding federal policy requiring matter at issue to be decided by NLRB, not by state courts); *Cox Broadcasting*, 420 U.S. at 485-87 (holding that delaying review would leave important question regarding freedom of press in "uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press").

In short, because this case does not fit any exception to § 1257's final judgment requirement, this Court lacks jurisdiction to review the decision below.

B. The West Virginia Supreme Court of Appeals Articulated Independent State Grounds For Its Decision.

In this case, the West Virginia Supreme Court of Appeals was asked to construe a state venue law, W. Va. Code § 56-1-1(c). The court held that, because petitioner Jefferds is a West Virginia corporation, "the provisions of W. Va. Code § 56-1-1(c) (2003) do not apply to Morris' suit against Jefferds." Jefferds App. 21.

In choosing to give the West Virginia venue statute a narrow reading, the state court started by discussing its concerns about whether Petitioners' reading of the state law was "constitutionally permissible." It then explained that, "[a]dditionally," Petitioners' reading "would contravene established West Virginia law, including other provisions of W. Va. Code § 56-1-1." Jefferds App. 19 (citing W. Va. Code 56-1-1(a)); *see also id.* 34 (Benjamin, J., concurring). Section 56-1-1(a) provides, in pertinent part, that "venue lies against a domestic corporation doing business in this State wherein its principle office is located, or where its president or principal officer resides." The state supreme court's reading of W. Va. Code § 56-1-1(a), which provides an independent basis for the decision below, presents no question appropriate for this Court's review. Therefore, the petition should be denied.

C. No Conflict Exists Among The State High Courts On The Issue Decided Below.

Below, the court rejected a reading of a state venue statute that would "categorically immunize a West Virginia

defendant" from suit in West Virginia by a nonresident. Jefferds App. 19. Attempting to fashion a conflict worthy of this Court's review, both Petitioners cite cases from various state courts addressing the relationship between the Privileges and Immunities Clause and forum non conveniens doctrine and venue statutes. *See* Jefferds Pet. 18-24; Crown Pet. 12-15. These cases do not conflict with the decision below.

1. Petitioners' reliance on forum non conveniens cases is misplaced.

Unlike the instant case, the majority of the cases cited by Petitioners do not involve venue statutes. Rather, they address the balance of factors that justify discretionary dismissal under the common-law doctrine of forum non conveniens. None of these cases conflicts with the decision below, which considers whether a state statute imposes a categorical bar on suit by out-of-state plaintiffs against in-state defendants.

For example, in *Gore v. United States Steel Corp.*, 104 A.2d 670 (N.J. 1954), the New Jersey court construed the forum non conveniens doctrine "not [to] turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice." *Id.* at 675-76. Thus, the court held that an action by or against a nonresident will not "ordinarily" be dismissed, but "only in those exceptional cases where a weighing of all of the many relevant factors" establishes that another forum will be more convenient and better serve the ends of justice. *Id.* at 676. Similarly, in *Mooney v. Denver & Rio Grande Western Railroad Co.*, 221 P.2d 628, 647 (Utah 1950), the court stated: "Granting discretionary power in the trial court to dismiss the cause for reasons of inconvenience, the power should only be exercised in exceptional circumstances and when an adequate showing has been made that the interests of justice require a

trial in a more convenient forum." The court reversed a trial court's forum non conveniens dismissal and remanded for fuller consideration of the facts concerning the convenience of witnesses, costs, the convenience of the court, and the condition of the court calendar in the alternate jurisdiction. *Id.* at 648-49. Thus, the forum non conveniens cases do not pose the question, decided below, whether a state venue statute may impose a strict rule requiring dismissal based on the presence or absence of a specific factor.

Petitioner Crown suggests that the decision below generally rejects the notion of forum non conveniens and runs counter to decisions that apply forum non conveniens doctrine. *See* Crown Pet. 14. That suggestion is wrong. The decision below addresses only the narrow question whether a state statute *requires* dismissal of an action against a state resident when the plaintiff is a nonresident. The court held that West Virginia's venue statutes do not authorize a "categorical" dismissal of such an action. The decision neither states nor implies that forum non conveniens cannot be applied in appropriate circumstances. Indeed, the concurrence of Justice Albright (who also joined the majority opinion in full) emphasizes that nothing in the court's opinion suggests that forum non conveniens may not be applied in appropriate cases to dismiss suits by nonresidents, precisely because forum non conveniens—unlike a categorical venue statute—does not erect a classification that discriminates solely on the basis of state citizenship. Rather, the focus of forum non conveniens is on the convenience of parties, witnesses, and courts, and it may result in the dismissal even of claims brought by residents of a state. Jefferds App. 43. Nothing in the majority opinion is to the contrary, and the contention that the opinion conflicts with decisions upholding the application of forum non conveniens doctrine is therefore unwarranted.

Most of the forum non conveniens cases cited by Petitioners are also irrelevant because they involve cases filed by nonresident plaintiffs against nonresident defendants. All but two of the forum non conveniens cases cited, *Gore*, 104 A.2d 670, and *Westerby v. Johns-Manville Corp.*, 32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982), fall into this category. Asserting the discretionary power to dismiss cases on convenience grounds where the defendant is not a resident of the forum state is a far cry from imposing a mandatory prohibition on suits by nonresident plaintiffs against resident defendants. Indeed, the holdings in *Harvey v. Eastman Kodak Co.*, 610 S.W.2d 582 (Ark. 1981), and *Grovey v. Washington National Insurance Co.*, 119 S.W.2d 503 (Ark. 1938) (both cited in Jefferds Pet. 24), are expressly limited to actions "between nonresidents." *Harvey*, 610 S.W.2d at 585; *see Grovey*, 119 S.W.2d at 504. *Grovey* even distinguishes a situation involving resident defendants. *Id.* at 506.

Aside from *Gore*, discussed above, the only other cited forum non conveniens case involving a resident defendant is from a state trial court in Pennsylvania, *Westerby v. Johns-Manville Corp.*, 32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982). *Westerby* involved one in-state and several foreign corporate defendants. The trial court held that "Pennsylvania law" did not prohibit dismissal based on forum non conveniens where a Pennsylvania corporation is a defendant. *Id.* at 178. The court explained that flexibility was an important part of forum non conveniens doctrine, which in Pennsylvania derives from case law, not statute. *Id. See also Walker v. Ohio River Co.*, 205 A.2d 43, 46 (Pa. 1964) (Pennsylvania Supreme Court reversing forum non conveniens dismissal, largely because defendant did business in and had principal office in the state). The West Virginia Supreme Court's decision does not conflict with the analysis of the trial court in *Westerby*. Rather, the decision

below expressly rejects Petitioners' reading of West Va. Code § 56-1-1(c) because, rather than allowing the state courts flexibility to balance factors, their reading would treat Mr. Morris's residency as a "categorical bar to his bringing suit in West Virginia against" the resident defendant Jefferds. *See* Jefferds App. 20-21; *id.* 43 (Albright, J., concurring) (permissible to take residency "into account," but impermissible to treat residency as a "*categorical* ground" requiring dismissal without regard to other factors that may be relevant).

2. The cases Petitioners cite involving venue statutes do not conflict with the judgment below.

The petitions cite only two cases involving venue statutes that discriminate against filings by nonresidents: *Rosenthal v. Unarco Industries*, 297 S.E.2d 638 (S.C. 1982); and *Loftus v. Pennsylvania Railroad Co.*, 140 N.E. 94 (Ohio 1923). These cases present no conflict over the Privileges and Immunities Clause that requires resolution by this Court. Indeed, *Rosenthal* does not even discuss the Privileges and Immunities Clause and relies exclusively on South Carolina case law.

Moreover, neither of the two cases involved resident defendants. This distinction is critical because a flat prohibition on a suit by a nonresident against a resident is obviously a much more burdensome discrimination against nonresidents and a much more naked preference for state citizens than a rule permitting dismissal of suits entirely between nonresidents. Suing where a defendant resides is usually the most dependable way of ensuring jurisdiction over the defendant, and a rule prohibiting nonresident plaintiffs from suing state residents is a significant impairment of plaintiffs' access to the courts. *See also Gober v. Federal Life Ins. Co.*, 237 N.W. 32, 33 (Mich.

1931) (although Michigan venue statute seems to restrict suits against nonresidents, "[i]f defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this state on her cause of action").

In fact, although both Petitioners rely on *Loftus*, which involved a nonresident defendant, the Ohio Supreme Court later considered a case brought against both a New Jersey corporation doing business in the Ohio county where suit was brought and a railroad company that did not do business in that county. *See Baltimore & Ohio R.R. Co. v. Ballie*, 148 N.E. 233 (Ohio 1925). In *Ballie*, the Ohio court stated that, "admittedly," the case could be maintained against the company that did business in the county. Thus, the decisions of the Ohio Supreme Court are not inconsistent with the holding of the West Virginia court below.

Petitioners also cite *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999), which concerns a state statute. However, the portion of the opinion on which Petitioners rely does not address a categorical venue statute. Rather, it addresses a forum non conveniens provision that provides for discretionary dismissal based on consideration of a variety of factors. *Id.* at 568 (discussing Tex. Civil Prac. & Rems. Code § 71.051), *cited in* Jefferds Pet. 19-21; Crown Pet. 13. In another part of the opinion, *Owens Corning* discusses a state statute (since repealed) requiring dismissal of certain asbestos claims filed in Texas by nonresidents. Claims dismissed under that provision, however, could be refiled in Texas. *See Owens Corning*, 997 S.W.2d at 580.

D. The Decision Below Is Consistent With Supreme Court Jurisprudence.

Petitioners, focusing on *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 387 (1929), and

Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U.S. 1 (1950), argue that the decision below is wrong under this Court's precedents. Both *Douglas* and *Mayfield* held that application of forum non conveniens to dismiss the case did not contravene the Privileges and Immunities Clause under the facts presented. As is true with regard to most of the state cases cited in the petitions, both of these cases considered dismissal under forum non conveniens doctrine, not a categorical discrimination under a venue statute. In addition, and again as is true with regard to nearly all of the state cases cited, both *Douglas* and *Mayfield* involved out-of-state defendants. *Douglas*, 279 U.S. at 385; *Mayfield*, 340 U.S. at 2-3. Thus, the specific issue decided by the West Virginia court in this case was not presented in those cases. In addition, in contrast to this case, no substantial part of the acts or omissions giving rise to the plaintiff's cause of action occurred in the state where either *Douglas* or *Mayfield* was brought.

Petitioners point to language from these older cases stating that, to comply with the Privileges and Immunities Clause, states may not discriminate between citizens and non-citizens, but they may discriminate between residents and non-residents. The West Virginia Supreme Court was aware of these cases, *see* Jefferds App. 26, 28 (dissent), but based its analysis on this Court's more recent view that "resident" and "citizen" are "essentially interchangeable." *Id.* 8 (quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)); *see also id.* (citing *United Bldg. & Constr. Trades Council v. Mayor & Council of City of Camden*, 465 U.S. 208, 216 (1984)). The decision below is fully consistent with the Court's recent cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

JEREMIAH "BART" MORRIS
Respondent.

On Petition for Writ Of Certiorari
To The West Virginia Supreme Court of Appeals

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INTRODUCTION

The underlying action is one in which a Virginia resident, Jeremiah Morris, is seeking damages arising out of a workplace accident in Virginia – an accident regarding which most if not all witnesses and evidence will be located in Virginia. Presumably seeking to avoid Virginia's strict adherence to contributory negligence principles, Mr. Morris brought his claim in West Virginia, which has no substantive nexus to the allegations.

Seeking to preserve its scarce resources for actions with an actual relationship with the State, and to address the perception that it is or will become a magnet for litigation in which it has no interest, the West Virginia Legislature enacted a forum non conveniens statute to preclude venue in cases such as Morris's, which should be heard in another state. See W. Va. Code 56-1-1(c).

However, in a results-oriented, activist opinion, the West Virginia Supreme Court of Appeals struck down these efforts by the Legislature. Misapplying the Privileges and Immunities Act of the U.S. Constitution, the court turned the statute on its head; inconsistent with the plain intent of the Legislature, the statute now not only encourages lawsuits with no nexus with the state, it provides an incentive for non-residents to seek out West Virginia residents to sue in order to exploit a perceived favorable jurisdiction. At the same time, it protects non-West Virginia companies, requiring that additional burdens be met before such a suit may be filed.

Moreover, this decision of the West Virginia high court flies in the face of decades of jurisprudence and legislative policy, from this Court and from other high courts and legislatures throughout the country. Respondent's argument in opposition, while valiant in light of the overwhelming precedent and policy against it, does not change this reality. Accordingly, Petitioner relies on the points made

in its Petition to address those substantive arguments from Respondent.

However, Respondent does raise two new arguments. First, Respondent claims that this Court does not have jurisdiction to hear this matter. Additionally, he argues that the West Virginia high court's ruling was based on state grounds independent of the constitutional basis. As explained further below, neither argument has merit. Respectfully, Petitioner again urges this Court to accept its Petition to affirm the role of the court and to re-establish a thoughtful and constitutional venue statute rightfully created by West Virginia's legislature.

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(a).

Pursuant to Title 28 of the U.S. Code, this Court has jurisdiction to hear appeals from "[f]inal judgments or decrees rendered by the highest court of a State . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." 28 U.S.C. § 1257(a).

As this Court has held repeatedly, for purposes of § 1257, an opinion regarding venue rendered by a state's highest court is considered a "final judgment[ ]." See Burlington Northern Railroad Co. v. Ford, 504 U.S. 648, 650 n.* (1992) (citing Starnes, infra); American Motorists Ins. Co. v. Starnes, 425 U.S. 637, 642 n.3 (1976) (relying on Langdeau, infra); Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555, 558 (1963).

Langdeau, the seminal case governing this jurisdictional issue, involved allegations against two national banks (and others) who were sued in Travis County, Texas based on a venue provision of the state's insurance code. At odds with that state venue provision, however, was a federal

banking statute which established venue as the county where the banks were located - Dallas County. 371 U.S. at 556-57. Prior to trial of the underlying conspiracy and fraud case, the banks sought certiorari regarding which statute governed, thus determining the proper venue for the case. The receiver for the insurance company challenged this Court's jurisdiction on grounds that the ruling of the Texas Supreme Court (that a federal statute could not prohibit suit in a venue expressly allowed by the state venue statute) was not a final judgment. See id. at 557.

Accepting jurisdiction and holding that for purposes of § 1257, the Texas high court's ruling was a final judgment, this Court stated thus:

> [W]e believe that it serves the policy underlying the requirement of finality in 28 U.S.C. s 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Id. at 558. Likewise, if this Court waited until after the underlying products liability design defect claim was tried in West Virginia, and thereafter ruled in favor of Petitioner's position that venue is not appropriate in West Virginia, the parties would have been subjected "to long complex litigation . . . all for naught. . . ." Id. Indeed, these factual circumstances present an even stronger argument for early consideration than those in Langdeau, because the resources of two different states are at issue (West Virginia and Virginia, which Petitioner believes is the proper venue).

Moreover, based on Langdeau, this Court has accepted jurisdiction in a directly analogous set of circumstances, where it granted certiorari so that it could determine the constitutionality of a state venue statute. Starnes, 425 U.S. at

642 n.3 (stating that "[f]or the reasons stated in Mercantile Nat. Bank v. Langdeau . . . the judgment presently before the Court is final for purposes of s 1257(2), and holding that the state venue statute did not violate the Equal Protection Clause). Even after the 1988 Amendments to § 1257, the Court has continued to deem rulings governing venue statutes to be final judgments for purposes of the rule. See Ford, 504 U.S. at 650 n.* (stating that "[t]he decision below is final for purposes of 28 U.S.C. § 1257(a)," and upholding the constitutionality of the subject state's venue rules).

Because this Court has determined that rulings affecting venue are final judgments for purposes of 28 U.S.C. § 1257(a), Respondent's arguments regarding the exceptions to § 1257 are of no consequence. It is undisputed that this Court's holding on the constitutionality of West Virginia Code § 56-1-1-(c), the state venue statute, will determine the venue of this case (West Virginia or Virginia). Thus, jurisdiction is appropriate under § 1257(a).

II. THE WEST VIRGINIA HIGH COURT'S HOLDING WAS NOT BASED ON STATE LAW.

The West Virginia high court never wavered in its reasoning that its constitutional analysis formed the sole basis of its opinion. After a lengthy discussion of the Privileges and Immunities Clause, the court expressly held that

> under the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.
>
> Applying the foregoing principles to the facts of the instant case, we conclude that the circuit court impermissibly applied *W.Va. Code*, 56-1-1(c) [2003] to treat Mr. Morris'

> nonresidency as a categorical bar to his bringing a suit in West Virginia against Jefferds. Moreover, Jefferds is a West Virginia corporation, and the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to Morris' suit against Jefferds.
>
> Therefore, the circuit court's dismissal of Morris' suit against Jefferds must be reversed.

Crown's App. 20A; Jefferds App. 20-21 (emphasis added). Likewise, the Syllabus by the court identifies the Privileges and Immunities Clause as the basis for the specific ruling being challenged by Petitioner. See Crown's App. 3A; Jefferds App. 3. Based on this plain language, there can be no dispute that the basis of the court's holding was its analysis under the Privileges and Immunities Clause.

Respondent's reference to the West Virginia high court's sole mention of W. Va. Code § 56-1-1(a), notably in a footnote, is merely dicta stated as further support of the court's view that an interpretation of § 56-1-1(c) which categorically barred suits against resident defendants "would contravene the constitutionally permissible scope of the venue statutes in an interstate context." Crown App. 20A; Jefferds App. 19 (emphasis added). Moreover, § 56-1-1(a) governs suits brought by resident plaintiffs and could only be interpreted as inconsistent with § 56-1-1(c) if § 56-1-1(c) were construed as to not apply to resident defendant corporations – the crux of the constitutional debate. See Crown App. 61A-63A (stating § 56-1-1 in its entirety). Such a circular argument would not form an independent basis for a high court ruling, nor would one explained entirely in a footnote. See Crown App.19A n.7; Jefferds App. 19 n.7.

CONCLUSION

For the reasons set forth herein and in its Petition, Crown Equipment Corporation's Petition for Writ of Certiorari must be granted.

Respectfully submitted,

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v.

JEREMIAH "BART" MORRIS,
Respondent.

CROWN EQUIPMENT CORPORATION,
Petitioner,

v.

JEREMIAH "BART" MORRIS
Respondent.

On Petitions for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF OF AMERICAN CHEMISTRY COUNCIL, AMERICAN INSURANCE ASSOCIATION, CERTAINTEED CORPORATION, THE DOW CHEMICAL COMPANY, MOBIL CORPORATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, OWENS-ILLINOIS, INC., AND UNITED STATES STEEL CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*[1]

West Virginia Code § 56-1-1(c) is a reform provision designed to curb the long-exercised and well-documented proclivity of nonresident plaintiffs to swamp that State's courts with mass tort claims having little or no factual connection with the forum. The West Virginia Supreme Court has construed the Privileges and Immunities Clause, U.S. Const., art. IV, § 2, cl. 1, to condemn that statute if it is given its plain meaning. Purportedly to save it, the court construed the statute to require West Virginia courts to hear claims brought by nonresident plaintiffs whenever a West Virginia resident is a defendant — even if none of the operative facts occurred in West Virginia. The result in West Virginia is that nonresident plaintiffs may again besiege its courts with claims arising outside of that State so long as they adopt the expedient of naming a West Virginia resident among the defendants. The ancillary result is to cast a cloud over similar existing or contemplated statutes in other states.

The *Amici* are vitally concerned with the preservation of § 56-1-1(c) and similar laws in other States. The *Amici* are companies and organizations with member companies that have a strong interest in ensuring that mass tort claims are litigated both fairly and in the proper forum. Many of the *Amici* (or their member companies) have been defendants in asbestos mass tort litigation in West Virginia where thousands of out-of-state plaintiffs, lured by that State's pro-plaintiff procedures and atmosphere, brought suit

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

even though their claims had no factual connection with the State.

Amicus the American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $550 billion enterprise and a key element of the Nation's economy. The issue in this case is of direct interest to ACC and its members because asbestos-related actions are often filed in West Virginia courts against ACC member companies even though the plaintiffs in those cases may have little or no contact with the State.

Amicus the American Insurance Association ("AIA") is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus* briefs in cases before federal and state courts on issues of importance to the insurance industry. The issues in this case are of direct interest to AIA and its members because AIA members are often the liability insurers of companies sued in West Virginia.

Amicus CertainTeed Corporation, headquartered in Valley Forge, Pennsylvania, is a leading manufacturer of a variety of building products, including vinyl and fiber cement siding, vinyl and composite decking, railing and fencing, vinyl windows, residential, commercial and mechanical glass fiber insulation, and residential and commercial roofing, pipe and foundations. CertainTeed has been named as a defendant in several thousand asbestos personal injury lawsuits, including many claims in West Virginia having essentially no connection with that jurisdiction.

Amicus The Dow Chemical Company is a leading science and technology company that provides innovative chemical, plastic, and agricultural products and services to a wide range of markets that are vital to human progress, including food, transportation, health and medicine, personal and home care, and building and construction. Dow and its affiliated companies have been sued in asbestos and other mass tort litigation, including in West Virginia by plaintiffs who have had little or no contact with West Virginia prior to the filing of their lawsuits.

Amicus Mobil Corporation is wholly owned by ExxonMobil Corporation, the largest publicly owned energy company in the world. Mobil has never produced or marketed asbestos. It is a defendant in many asbestos cases, however, because small amounts of encapsulated asbestos were used as a component in heat-resistant coatings products manufactured by the company between 1963 and 1980. Thousands of asbestos claims have been filed against Mobil in West Virginia, most of which do not involve West Virginia residents and arise out of alleged exposures that took place elsewhere.

Amicus the National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Amicus Owens Illinois Inc., a Delaware Corporation with its headquarters in Ohio, is the world's largest manufacturer of glass containers. Between 1948 and

1958, the company manufactured commercial quantities of an asbestos-containing pipe and block insulation in New Jersey. Tens of thousands of asbestos-related personal injury lawsuits have been filed against the company across the country. It appears that many of these cases have been filed in West Virginia by non-resident plaintiffs who have had little or no contact with West Virginia prior to the filing of their lawsuits.

Amicus United States Steel Corporation is an integrated steel producer incorporated in Delaware with corporate headquarters in Pittsburgh, Pennsylvania. Its major steelmaking facilities are located in Indiana, Alabama and Pennsylvania. U S Steel is a defendant in approximately 3,200 active state court asbestos cases. Approximately 90 percent of these cases are filed in "magnet" states that allow or at one time did allow mass filings of asbestos cases with multiple plaintiffs. Over the years, asbestos cases have been filed against U S Steel and new cases are still being filed against U S Steel by non-resident plaintiffs in West Virginia, where U S Steel has no production or office facilities.

STATEMENT OF THE CASE

A. Before the Enactment of § 56-1-1(c), West Virginia Had Been a "Magnet Jurisdiction" For Mass Tort Claims Brought by Nonresident Plaintiffs.

As the Court knows, the "elephantine mass"[2] of asbestos claims filed nationwide is staggering — an estimated 730,000 through 2002.[3] By the mid-1990s, roughly 50,000 new claims were being filed every

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[2] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

[3] Stephen J. Carroll et al., *Asbestos Litigation*, at 70 (Rand Inst. for Civil Justice 2005) (hereinafter "*Asbestos Litigation*").

year.[4] West Virginia has been one of the forums of choice for these claims — a so-called "magnet jurisdiction." Even though that State has less than one percent of the Nation's population,[5] more than 11 percent of the asbestos personal injury and wrongful death claims filed in state courts between 1988 and 1997 were filed there.[6] In fact, between 1993 and 1997, 7.8% of state court asbestos claims filed nationwide were brought in only two West Virginia counties, Monongalia and Kanawha.[7]

The defendants in these cases were gravely hindered in their ability to defend themselves against this avalanche. Plaintiffs' attorneys filed single complaints for hundreds, even thousands, of plaintiffs against dozens of defendants that provided essentially no information about the claims of any individual plaintiff.[8] The West Virginia courts thereupon consolidated thousands of claims for mass trials — a response that led to confusion about the actual cases set for trial and that actually boomeranged and led to increased filings.[9]

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[4] *Id.* at 72.

[5] In 2004, West Virginia's population of 1,815,000 represented about 0.6% of the country's total population of 293,655,000. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, table 21, at 25 (Dec. 2005).

[6] Between 1988 and 1992, 12% of asbestos claims filed in state courts were filed in West Virginia; between 1993 and 1997, the figure was 11%. *Asbestos Litigation*, *supra* note 3, table 3.3, at 62.

[7] *Id.*, table 3.4, at 64.

[8] *See, e.g., Emch v. Owens-Corning Fiberglas Corp.*, Fourth Amended Complaint, No. 95-C-215M (W. Va. Cir. Ct. Marshall Cty., filed Mar. 29, 1996) (complaint named 4,900 plaintiffs and 46 defendants); *Adams v. Owens-Corning Corp.*, Amended Complaint, No. 97-C-22M (W. Va. Cir. Ct. Marshall Cty., filed Mar. 14, 1997) (complaint named 1659 plaintiffs and 49 defendants).

[9] *See State ex rel. Allman v. MacQueen*, 551 S.E.2d 370, 371 & n.1 (W. Va. 2001) (The court estimates that the consolidation plan

The West Virginia courts understood that a majority of these asbestos claims were filed by nonresidents of West Virginia. The concurring justice in *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va.), *cert. denied*, 537 U.S. 944 (2002), an unsuccessful due process challenge to a mass consolidation, observed that "as many as five thousand of the plaintiffs included in the June 24, 2002 mass trial are not West Virginia residents and were never exposed to asbestos in this State. Rather, they have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794-95 (W. Va. 2002) (Maynard, J., concurring). In West Virginia, as elsewhere, the overwhelming mass of asbestos cases "defies customary judicial administration." *Ortiz*, 527 U.S. at 821.

B. Section 56-1-1(c) Was Designed To Curb Abusive Forum-Shopping.

The West Virginia Legislature took action in 2003 by enacting W. Va. Code § 56-1-1(c) which provides that, after its effective date, venue will not lie for any suit brought by "a nonresident of the state * * * unless

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involves "approximately 8,000 asbestos plaintiffs," but adds that it "is uncertain as to the exact number of plaintiffs included in the litigation below."); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 n.3 (W. Va.) (court also "uncertain" as to number of cases, which is estimated to be about 7,715), *cert. denied*, 537 U.S. 944 (2002).

The judge who presided over early consolidations later admitted that they did not eliminate the backlog of cases, but rather simply drew new cases, many of them from out of state: "I will admit that we thought that [an early consolidation] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-22, slip op. (Cir. Ct. Kanawha Cty., W. Va., Nov. 8, 2000) (statement of Judge A. Andrew MacQueen III).

all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state * * *." To provide flexibility, the Legislature provided an exception if the "nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose."

The number of cases filed in West Virginia state courts dropped dramatically after enactment of that provision. In the years 2001 and 2002, an average of 1,850 "mass litigation" civil cases were filed in West Virginia state courts.[10] By 2005 the number had dropped to 57.[11]

C. The Decision Below

West Virginia's effort to control the flood of foreign mass tort litigation is being tested in a less dramatic setting. Respondent Morris is a Virginia resident who sued petitioners in Kanawha County, West Virginia, for an industrial injury occurring in Virginia. The West Virginia Supreme Court of Appeals reversed the trial court's grant of petitioners' motions to dismiss under § 56-1-1(c). Referring to the statute's bar to suit by non-residents, the court held that the "Privileges and Immunities Clause counsels against such discrimination against nonresidents and favoritism and protectionism on behalf of residents." Pet. App. 18.[12] The court then said that a construction of the statute to "categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a

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[10] West Virginia Court System, 2001 Annual Report, table, at 10; West Virginia Court System, 2002 Annual Report, table, at 10. Copies of these reports are available at <http://www.state.wv.us/wvsca/presspge.htm>. The definition of "mass litigation" as used by the West Virginia courts is provided by W. Va. Trial Ct. Rule 26.01(c).

[11] West Virginia Court System, 2005 Annual Report, table, at 16.

[12] All cites to "Pet. App." are to the Jefferds petition in No. 06-487.

nonresident would contravene the constitutionally permissible scope of the [State's] venue statutes" and would also contravene § 56-1-1(a), which provides that "venue lies in suits against domestic corporations doing business in the State." *Id.* at 19 & n.7. The court then noted that it should whenever possible construe a statute so "as to avoid a conflict with the constitution," and concluded: "We therefore hold that *under the Privileges and Immunities Clause* * * * [§] 56-1-1(c) * * * do[es] not apply to civil actions filed against West Virginia citizens and residents." *Id.* at 20 (emphasis added.).

Next the court noted that, under the venue-giving defendant rule, "once venue is proper for one defendant, it is proper for all other defendants subject to process." *Id.* at 22. The court refused to construe § 56-1-1(c) to disturb that rule and thus require a nonresident plaintiff to establish venue independently for each defendant because such a construction, among other things, would "run[] headlong into the foregoing-discussed constitutional principles that strongly disfavor discrimination on the basis of residency in access to the courts." *Id.* at 25.

Justice Maynard dissented and would have upheld the statute against constitutional challenge. *Id.* at 26. Justice Benjamin agreed with much of Justice Maynard's analysis but concurred in the reversal on the ground that Respondent should have been given an opportunity to amend his complaint to allege facts showing that the acts underlying his claim had occurred in substantial part within West Virginia. *Id.* at 31. Justice Albright concurred with the majority's reasoning and conclusions but wrote separately. *Id.* at 39.

ARGUMENT

This case involves the balance between two competing interests that inhere in our federalism: (a) the right of a State to ensure that the expenditures of its resources (here its judicial resources) benefit its own citizens, and (b) the requirement of interstate equality for citizens of other States mandated by the Privileges and Immunities Clause. Review is warranted because the decision below conflicts with two decisions of this Court on how that balance should be struck when the issue is access to courts. Review is also warranted because, if the decision below is allowed to stand, it will predictably affect thousands of cases in West Virginia and possibly thousands more in other states that have adopted or are considering adopting statutes similar to § 56-1-1(c).

I. THIS COURT HAS JURISDICTION.

A. The Decision of the West Virginia Supreme Court of Appeals Is Final for Purposes of 28 U.S.C. § 1257(a).

The Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a), allowing review of "[f]inal judgments" of the "highest court of a State in which a decision could be had." It might be thought that the decision of the West Virginia Supreme Court of Appeals is not "final" because that court remanded the case for trial. But this Court on three occasions has ruled that the decision of the highest state court on whether federal law supersedes state venue requirements is final for purposes of § 1257(a) even though the case has been remanded for trial. *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Burlington N. R.R. v. Ford*, 504 U.S. 648, 650 n.* (1992); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n. 3 (1976).

As the Court explained in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the decision in such cases rests on two premises. First, the state court's resolution of the impact of federal law on state court venue requirements is a "'separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 483-84 (quoting *Langdeau*, 371 U.S. at 558). Second, it serves the "policy of the federal statute 'to determine now in which state court [petitioners] may be tried rather than to subject them * * * to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.'" *Id.* at 484 (quoting *Langdeau*, 371 U.S. at 558).

Accordingly, under *Langdeau*, *Ford*, and *Starnes* the decision below is final for purpose of § 1257(a).

B. There Is No Independent and Adequate State Ground.

That the West Virginia Supreme Court of Appeals purported to construe the state venue statute at issue so as to harmonize it with that court's interpretation of the Privileges and Immunities Clause does not mean that the decision below rests on an adequate state ground so as to deprive this Court of jurisdiction. The West Virginia court ruled that its construction of § 56-1-1(c) was compelled by its understanding of the Privileges and Immunities Clause, as the court-prepared syllabus of its ruling makes this clear: "Under the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2, the provisions of W. Va. Code, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents."[13] This Court has repeatedly

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[13] Pet. App. 3 (syllabus point 2). Article VIII, § 4 of the West Virginia Constitution requires its Supreme Court of Appeals "to

held that it has power to review a state court's decision when the state court "felt compelled by what it understood to be federal constitutional considerations to construe * * * its own law in the manner it did". *E.g., Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (citation omitted). That is the situation here.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS ALLOWING STATES TO CONDITION COURT ACCESS ON RESIDENCY.

In *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), this Court ruled that Missouri could dismiss a Federal Employee Liabilities Act case that did not arise in that State on the ground of *forum non conveniens*. The Court held: "[I]f a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control." *Id.* at 4 (quoting *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377, 387 (1929)).

In *Douglas*, the Court upheld a New York statute that gave that State's courts discretion to dismiss claims by nonresidents against foreign corporations, ruling: "There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." 279 U.S. at 387. In yet another case, the Court upheld a state statute of limitations that barred suits by nonresidents if the suit was time-barred in the jurisdiction where the action arose, but allowed suits under the same facts when brought by a

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prepare a syllabus of the points adjudicated in each case in which an opinion is written * * *." *See, e.g., Walker v. Doe*, 558 S.E.2d 290 (W.Va. 2001).

resident. *Canadian N. Ry. v. Eggen*, 252 U.S. 553 (1920).[14]

In sustaining the preferences given residents in those cases, the Court distinguished between state "citizens" and "residents." It construed the statutes at issue to apply equally to all "nonresidents," even if the nonresident happened to be a "citizen" of the forum state, and that equality saved the statutes under the Privileges and Immunities Clause. The same rationale assures the constitutionality of § 56-1-1(c), which may be seen simply to grant preferential access to West Virginia courts to residents of West Virginia over the claims of nonresidents, even if the nonresidents also happen to be citizens of West Virginia.

That, indeed, is the basis on which Justice Maynard dissented below. He would have construed § 56-1-1(c) "to apply to all nonresidents, both citizens and noncitizens of West Virginia" to prevent "a West Virginia citizen who is residing in Ohio * * * and who is injured in Ohio by machinery manufactured by a West Virginia company from suing that company in West Virginia." Pet. App. 29. As Justice Maynard correctly observed: "Such a construction * * * would not offend the Privileges and Immunities Clause" under this Court's decisions in *Mayfield* and *Douglas*. *Id.*

The majority below evidently believed that *Mayfield* and *Douglas* are no longer good law. It said that "[i]t is now established that under the Privileges and Immunities Clause there is ordinarily no difference between discrimination based on a person's 'residence' and discrimination based on a person's 'citizenship.'"

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[14] *See also Chambers v. Baltimore & O. R.R.*, 207 U.S. 142 (1907), where the Court upheld a state statute that allowed only claims for the wrongful death of one of its citizens on the ground that the statute allowed the wrongful death action to be brought by a personal representative who was a nonresident as well as by a personal representative who was a resident.

and it disparaged cases (without ever actually mentioning *Mayfield* or *Douglas*) that make the distinction between the two, given what it said was "the current irrelevance of that distinction in most cases." Pet. App. 7-8 n.2.

This Court in *United Building & Construction Trades Council v. Mayor & Council of City of Camden*, 465 U.S. 208 (1984) did say that "the terms 'citizen' and 'resident' are '*essentially* interchangeable' * * * for purposes of analysis of *most cases* under the Privileges and Immunities Clause." *Id.* at 216 (emphasis added; quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)). But what is "essentially" true for "most cases" is not necessarily or even probably true for cases involving access to state courts. Neither *City of Camden* nor *Austin* overruled *Douglas* or *Mayfield*. On the contrary, both *Douglas* and *Mayfield* were cited with approval by this Court in cases decided after *City of Camden* for the proposition that, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)).[15]

Accordingly, *Douglas* and *Mayfield* are still the law of the land and the West Virginia Supreme Court of Appeals erred in failing to follow them. That error standing alone warrants correction by this Court.[16]

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[15] *Douglas* was cited even more recently in *Alden v. Maine*, 527 U.S. 706, 801 (1999) (Souter, Stevens, Ginsberg, & Breyer, JJ., dissenting). *Mayfield* has also been cited repeatedly in relatively recent years. *E.g., American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994).

[16] Indeed, even under the *City of Camden* analysis, § 56-1-1(c) is constitutional. As the Court ruled in that case, "the privileges and immunities clause is not an absolute." Rather, discrimination against nonresidents may be justified "where there is a 'substantial

III. THE DECISION BELOW DEFEATS WEST VIRGINIA'S LEGITIMATE EFFORT TO PROTECT ITSELF AGAINST FORUM-SHOPPING ABUSES AND IMPERILS SIMILAR EXISTING OR ANTICIPATED EFFORTS BY OTHER STATES AS WELL.

The immediate result of the decision below is to permit respondent's case to proceed, even though he resides and his injury occurred in Virginia and even though the trial court found that he had "failed to produce any fact to establish that 'all or a substantial part of *(any) acts or omissions giving rise to (plaintiff's) claim*' occurred within the State of West Virginia." Pet. App. 53 (emphasis and parentheticals in original).

The decision also portends a return by West Virginia to its status as a magnet for foreign mass tort claims — just the problem the Legislature was trying to address. Nonresident plaintiffs, who had previously joined a West Virginia defendant to prevent removal to federal court,[17] will find it easy to join a West Virginia resident as a defendant, with the result that West Virginia courts will again be overrun with asbestos or other mass tort cases and § 56-1-1(c) will become a dead letter.

The decision's effect may be equally pernicious beyond West Virginia's borders. Florida, Georgia, Ohio, and Tennessee, for example, have each limited venue in some or all mass tort cases to claims brought by

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reason' for the difference in treatment" — as where nonresidents are "shown to 'constitute a peculiar source of the evil at which the statute is aimed.'" 465 U.S. at 222 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396, 398 (1948)). In West Virginia the nonresident plaintiffs are virtually the *entire* source of the evil at which § 56-1-1(c) is aimed. Hence the statute should have been upheld under either a general Privileges and Immunities Clause analysis (*City of Camden*) or under the analysis specifically applicable to statutes restricting access to state courts (*Douglas* and *Mayfield*).

[17] *See* 28 U.S.C. § 1441(b).

their residents or to claims brought by nonresidents who were allegedly exposed in those States.[18] Because it is based on federal constitutional grounds, the decision below places a cloud over those statutes and may well deter other States from enacting similar laws to prevent similar abuses.

Moreover, while the holding below, as reflected in the court's syllabus,[19] is that § 56-1-1(c) may not bar a suit by a nonresident against a West Virginia defendant, its reasoning sweeps more broadly, for the court concluded that "there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit." Pet. App. 18. That construction of the Privileges and Immunities Clause would require a State to provide a forum for actions between nonresidents that occurred entirely out-of-state so long as a resident of West Virginia could have brought suit under the same facts.

It would therefore call into question a broad array of state statutes that grant preferential access to the claims of state residents over the claims of nonresidents. These statutes provide venue for claims only in the county where plaintiff lives, or where the defendant has its principal office in the State, or where

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[18] *See* Fla. Stat. § 774.205(1) (limiting venue on asbestos or silica claims to cases where "the plaintiff is domiciled in this state" or where "the exposure to asbestos or silica that is a substantial contributing factor * * * occurred in this state."); Ga. Code Ann. § 51-14-8 (similar limitation to Florida's); Ohio R. Civ. P. 3(B)(11) (limiting venue in asbestos and silica cases to county where all exposed plaintiffs reside or where defendant has its principal place of business); Silica Compensation Fairness Act, 2006 Tenn. Pub. Acts, ch. 728 (2006) (limiting venue on silica claims to actions where "the plaintiff was a resident of Tennessee at the time the claim arose" or where "the claim arose in Tennessee.").

[19] Pet. App. 3 (syllabus point 2).

a substantial part of the events giving rise to the claim occurred. Thus, a non-resident plaintiff may sue a defendant in a state only if the defendant has a principal office there or if a substantial part of the claim arose there, while a resident is not so restricted. Under the principle embraced by the court below, these statutes would appear to contravene the Privileges and Immunities Clause because they provide a forum for claims of residents for certain out-of-state claims but bar such claims by nonresidents.[20]

Other States, such as Texas (a magnet jurisdiction in the 1990s), Colorado, and Louisiana, have enacted statutes requiring or authorizing *forum non conveniens* dismissal of the claims of nonresidents — but not those of residents — if certain conditions are satisfied.[21] These statutes, too, may be in jeopardy if the West Virginia Supreme Court's interpretation of the Privileges and Immunities Clause is correct.[22]

Still other courts have sought to curb abusive forum shopping through the common law of *forum non conveniens*. Thus, earlier this year the Mississippi Supreme Court held that the asbestos claims of nonresidents should have been dismissed for *forum non conveniens*, stating: "The courts of Mississippi will not become the default forum for plaintiffs seeking to

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[20] *See* Ala. Code § 6-3-7; Ark. Code Ann. § 16-55-213; Mo. Rev. Stat. § 508.010 (venue also proper in county were registered agent of foreign corporation resides); S.C. Code Ann. § 15-7-30. *See also* 735 Ill. Comp. Stat. 5/2-201 (venue proper where a defendant resides or where events occurred).

[21] *See* Tex. Civ. Prac. & Rem. Code Ann. § 71.051; Colo. Rev. Stat. § 13-20-1004(1); La. Code Civ. Proc. art 123B.

[22] In conflict with the decision below, the Texas Supreme Court upheld its statute against a Privileges and Immunities Clause challenge, relying on this Court's decision in *Douglas* "because it has never been overruled by the Supreme Court." *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex.), *cert. denied*, 528 U.S. 1005 (1999).

consolidate mass-tort actions." *3M Co. v. Johnson*, 926 So. 2d 860, ¶ 18 (Miss. 2006). The court held that "less deference should be given to the wholly out-of-state appellees' choice of forum." *Id.* at ¶ 19. *Accord, e.g., Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 277 (Ill. 2005) (dismissing claim against Illinois defendant: "[W]hen the plaintiff is foreign to the chosen forum and when the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's choice of forum is accorded less deference.").

The principle that less deference is accorded to the forum choice of a nonresident is deeply established in the law of *forum non conveniens*. This Court has instructed federal trial courts on the subject,[23] and the principle applies even when the nonresident sues a resident defendant.[24] Yet, if the court below is correct that the Privileges and Immunities Clause requires absolute equality between a resident and a nonresident in providing a forum for suits against a State's residents, then the preference in *forum non conveniens* cases for the claims of a State's residents is also constitutionally infirm.

In the end, whether the States try to deal with abusive forum shopping categorically through venue statutes or through consistent case-by-case application of common law *forum non conveniens* principles, they need to be certain that their efforts do not contravene the Privileges and Immunities Clause. There is not a word in that Clause, nor any indication in the decisions of this Court, that the requirements of the Clause apply differently to statutes that draw bright lines than to judicial decisions that proceed on

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[23] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

[24] *E.g., Radeljak v. DaimlerChrysler Corp.*, 719 N.W.2d 40, 43, 48 (Mich. 2006); *Kinney System, Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996); *Stangvik v. Shiley Inc.*, 819 P.2d 14, 20 (Cal. 1991);

a case-by-case basis. Either absolute equality between residents and non-residents is required, as the court below erroneously held, or it is not.

Amici believe that West Virginia's § 56-1-1(c) is a sensible response, fully consistent with the Privileges and Immunities Clause, to a crisis in its court system caused by mass filings by out-of-state residents. The statute is reasonable and balanced, providing for venue even for non residents if the cause of action arose within the State or if they cannot get jurisdiction over the defendants in another forum. If allowed to stand, the West Virginia Supreme Court of Appeals' contrary conclusion — that the statute is unconstitutional when applied according to its plain terms — will cast a shadow over similar existing statutes in other states and have a chilling effect on still other states seeking to protect their court systems from inundation by mass filings having no connection to the forum. Mass tort litigation can flow in torrents from one state to another, and it is vital to reaffirm the authority of the states in our Federal system to regulate this flow in a reasonable way — as West Virginia has done here.

Accordingly, this Court should grant review to resolve those uncertainties, if not by reaffirming the supremacy of *Douglas* and *Mayfield*, then by clarifying its Privileges and Immunities Clause jurisprudence so that States may have guidance in their efforts to safeguard the quality of justice in their courts.

CONCLUSION

The Court should grant the petitions for certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,
Petitioner,

v.

JEREMIAH "BART" MORRIS,
Respondent.

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

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BRIEF OF *AMICI CURIAE* AMERICAN TORT REFORM ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE WEST VIRGINIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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No. 06-503

IN THE
Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,
Petitioner,

v.

JEREMIAH "BART" MORRIS,
Respondent.

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

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BRIEF OF *AMICI CURIAE* OF THE AMERICAN TORT REFORM ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE WEST VIRGINIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

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[1] No counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court.

Amici are associations sharing a common interest in a fair, balanced, and predictable civil justice system. Their members include small and large businesses, trade associations, and municipalities, spanning every sector of the nation's economy. A more complete description of each amicus is set forth in Appendix A to this brief.

This case is of interest to *amici* because the decision below, if permitted to stand, not only threatens a regression to courts clogged by nonresident plaintiff claims in West Virginia, but casts a cloud over legitimate actions by state legislatures and judiciaries to address forum shopping. This Court has long held that states may permissibly regulate access to their local courts by nonresidents whose claims have little or no connection to the state. The West Virginia Supreme Court of Appeals' decision that the Privileges and Immunities Clause of the U.S. Constitution does not permit states to distinguish between resident and nonresident plaintiffs with respect to judicial administration is contrary to the well-established precedent of this Court.

Even more significantly, the decision places at risk the ability of courts throughout the nation to consider the state of residence of the parties when applying traditional forum non conveniens principles and places into question many similar state statutes. It could lead to uncertainty and, in some situations, utter reluctance on the part of state courts and legislatures to curb inappropriate forum shopping. As *amici* will show, uncertainty regarding the application of the Privileges and Immunities Clause was a significant factor in impeding the development of forum non-conveniens many years ago. Today, as commerce regularly extends across state lines, it is even more imperative that states have the unquestionable authority to dismiss cases of nonresidents that do not have a substantial relation to the forum state.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioner's statement of the case.

SUMMARY OF ARGUMENT

The State of West Virginia was and continues to be viewed as a magnet jurisdiction for cases that have no substantial relationship to the State and as a jurisdiction that is particularly unfavorable to civil defendants.[2] To address this problem, the West Virginia statute in question barred nonresidents from bringing suit in West Virginia courts unless all, or a substantial part, of the acts or omissions giving rise to the lawsuit occurred in West Virginia; or they cannot obtain jurisdiction over the defendant in the state where the action arose. *See* W. Va. Code § 56-1-1(c).

Here, the plaintiff was a citizen of the State of Virginia. The workplace accident giving rise to the claim occurred in Virginia. The forklift that the plaintiff alleges is defective was sold, delivered, installed, and serviced in Virginia, and never entered West Virginia. Furthermore, the conduct of the Petitioner, an Ohio corporation, did not occur in, and had absolutely nothing to do with, the State of West Virginia.[3] It

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[2] *See, e.g.*, Defense Trial Counsel of West Virginia, *Civil Justice Committee Report on the State of West Virginia's Civil Justice System* 7 (2003) (finding West Virginia a "magnet court" for claims with no relation to the state); Harris Interactive, *2003 U.S. Chamber of Commerce State Liability Systems Ranking Study* 80 (2003) (ranking West Virginia 49 out of the 50 states in overall litigation fairness and near the bottom for every other indicator of a fair civil justice system).

[3] The fact that co-defendant Jeffords is incorporated in West Virginia is inconsequential. As this Court has recognized, "Under modern conditions corporations often obtain their charters from state where they no more than maintain an agent to comply with local requirements while every other activity is conduct far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of forum non conveniens, which resists

was brought by the Respondent in a classic forum shopping effort to find a jurisdiction that might look with particular favor upon a plaintiff and apply the state's more advantageous comparative negligence law and perception of more favorable treatment by the state's judicial system.

The Privilege and Immunities Clause of Article IV, Sec. 2, of the Constitution of the United States should not be used as a tool to block legitimate attempts to stem lawsuit abuse – specifically, the flooding of a state's local courts by nonresident claims with little or no connection to the state. The West Virginia Supreme Court of Appeals' decision commits this precise error. *See Morris v. Crown Equip. Corp.*, 633 S.E.2d 292, 300 (W. Va. 2006). Improper construction of the Constitution has harmful consequences from both a local and national public policy perspective.

First, the West Virginia Supreme Court of Appeals' decision stops a legitimate state legislative attempt to prevent its courts from being overwhelmed by claims filed by nonresidents seeking to take advantage of procedural advantages, favorable law, or a perception of pro-plaintiff lower state courts and juries. The citizens of West Virginia will be harmed by this action and find their own attempts to seek justice delayed by claims that should be properly brought in other states. Further, West Virginia taxpayers bear the costs of litigation brought by nonresidents, who are effectively "free riders" on the state's judicial system. Local residents will also bear the burden of jury service on what can be lengthy and complex trials in which the state has no interest.

The ruling of the West Virginia Supreme Court of Appeals also sends a disturbing and unfounded signal to state

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formalization and looks to the realities that make for doing justice." *Koster v. American Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 528 (1947).

legislatures that wish to stop unwarranted forum shopping in their own jurisdictions. They have been informed by this decision that requiring nonresident plaintiffs, whose action did not arise in the forum state, to bring suit in their own state may violate the U.S. Constitution. It is a form of judicial nullification of a reasonable state legislative reform in the most dangerous sense. *See* Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall. L. Rev. 688 (2001). While state laws are most often nullified on the basis of an obscure or vague state constitutional provision to further a state judiciary's policy preferences, the West Virginia Supreme Court of Appeals' reliance on the Constitution of the United States places all similar reasonable legislative forum shopping restrictions in jeopardy.

Perhaps most significantly, this ruling casts a nationwide cloud over the application of longstanding principles of forum non conveniens by state court judges. State courts routinely exercise their discretion to decline jurisdiction over cases more appropriately heard in the courts of other states. They make such decisions based on the location of potential witnesses and relevant evidence, the choice of law applicable to the dispute, the possible undue hardship for the defendant, the most efficient use of judicial resources, and the interests of justice. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The state of residence of the plaintiff has always been a prominent factor in this calculus.

In sum, there was a clear, rational basis for the West Virginia legislature to provide a venue limitation to keep nonresident cases that have a connection with the state within its court system and cases that have little or no connection with the state out of its court system. The legislature even protected out-of-state plaintiffs more than was constitutionally necessary in that it allowed cases to be brought in West Vir-

ginia if plaintiffs could not find a forum elsewhere. This Court should hear and decide this case to make clear not only to the West Virginia legislature, but to the legislators and judges of the other 49 states and the District of Columbia, that it is constitutionally permissible and appropriate public policy to protect access to justice for local citizens and the taxpayers of a home state by precluding rampant "litigation tourism" from residents of other states. For these reasons, the Petition for Writ of Certiorari should be granted.

ARGUMENT

I. INTRODUCTION

In the 1990s, West Virginia courts faced an onslaught of litigation, many of which involved asbestos claims brought by out-of-state plaintiffs. West Virginia courts reacted by "adopt[ing] diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation," including mass consolidation of claims. *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996).

Instead of relieving burdened court dockets, expedited procedures and judicial shortcuts encouraged claims. As one West Virginia trial judge handling asbestos claims observed, "we thought [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. . . . [I]t drew more cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000). Mass tort expert Professor Francis McGovern of Duke University Law School has explained, "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595,

606 (1997). The largest single mass consolidation occurred in the state in 2002 when a trial court joined more than 8,000 plaintiffs suing numerous defendants. *See State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring) (citing the vast differences between the number of defendants, type of injury, degree of injury, stage of case development, and lawyer interests).

In a ruling that further exacerbated the situation, the West Virginia Supreme Court of Appeals limited the ability of courts to dismiss cases with little or no connection to the state, finding that the "doctrine of forum non conveniens is a drastic remedy which should be used with caution and restraint." *See Abbott v. Owens-Corning Fiberglas Corp.*, 44 S.E.2d 285, 292 (W. Va. 1994). The ruling has attracted non-residents through its adoption of plaintiff-friendly law, including the broadest claim for medical monitoring in the United States. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999). *But see Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

Not surprisingly, RAND found that West Virginia had become one of a few states where most of the nation's asbestos litigation flowed during the decade preceding adoption of the law at issue. *See* Stephen J. Carroll *et al., Asbestos Litigation* 62 (RAND Inst. for Civil Justice 2005). West Virginia's surge in claims was not limited to asbestos cases. A 2002 West Virginia Chamber of Commerce study found that litigation activity increased 53.6 percent more rapidly in the state than in the nation during the preceding decade. *See The Perryman Group, The Negative Impact of the Current Civil Justice System on Economic Activity in West Virginia* 3 (2003). A reputation as a pro-plaintiff forum contributed to the attraction of nonresident claims to West Virginia.

In reaction to the influx of claims from across the country, the West Virginia Legislature took the prudent step of

amending the state's venue statute in 2003. It provided that "a nonresident may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." W. Va. Code § 56-1-1(c). The Respondents are likely to contend that this law indiscriminately denies all nonresidents access to West Virginia courts. To the contrary, it allowed nonresidents to sue if a "substantial part" of the acts or omissions giving rise to the claim occurred in West Virginia or the nonresident could not obtain jurisdiction over the defendant where the claim arose. *See id.*

Although many states have applied similar restrictions on lawsuits brought by out-of-state claimants, either by statute or through judicial application of traditional forum non conveniens principles, the West Virginia Supreme Court of Appeals invalidated the venue law as a violation of the Privileges and Immunities Clause. *See Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006).

The Privilege and Immunities Clause provides that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." U.S. Const. art. IV, § 2. The Clause is intended "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 180 (1869). It prohibits states from discriminating between its citizens and the citizens of other states with respect to rights and benefits that are considered fundamental aspects of United States citizenship. This prohibition is not absolute and a state may make such distinctions when it has a substantial interest in doing so. *See infra* at Section II.B.

The West Virginia ruling departs from this Court's well-established precedent upholding similar restrictions and ignores the fundamental state interest in distinguishing be-

tween residents and nonresidents to preserve limited judicial resources for local residents and discourage forum shopping.

II. FORUM NON CONVENIENS SHOULD NOT RETURN TO CONSTITUTIONAL QUESTIONABLITY.

A. The Privileges and Immunities Clause Led to Hesitancy in Judicial Application of Forum Non Conveniens in Early Years.

The doctrine of forum non conveniens is said to have developed in early Scottish practice where courts declined to hear cases when justice dictated that the parties avail themselves of other forums. *See* Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 386-87 (1947). The doctrine arrived in the United States as part of the judiciary's inherent powers and was routinely applied. Paxton Blair's seminal 1929 article on the subject notes that the Privileges and Immunities Clause "led to hesitancy on the part of the courts in applying it to appropriate cases" in the nation's early years. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 3 (1929); *see also* Barrett, *supra*, 35 Cal. L. Rev. at 389. This was due in part to Justice Bushrod Washington's famous dictum in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230), in which he asserted that the right of access to the courts of a state is one of the privileges protected by the Clause; a statement that was cited with approval in several early cases of this Court. *See* Barrett, *supra*, at 389-90.

B. This Court Eliminated the Confusion and Firmly Established the Doctrine as Constitutionality Permissible.

This Court began to dissipate the confusion when it made clear that states may constitutionally limit the ability of non-

residents to bring actions in state courts in a case arising under FELA. *See Douglas v. New York, N.H. & H. R.R. Co.*, 279 U.S. 377 (1929). In that case, a New York statute provided that a foreign corporation or nonresident could only sue a foreign corporation in New York if the defendant foreign corporation conducted business in New York. *See id.* at 386. A Connecticut resident challenged the law on the basis that it allowed a New York resident to sue a foreign corporation in New York that conducted no business in the state, but did not provide him the same treatment. *See id.* In upholding that law, Justice Holmes, writing for this Court, recognized that "[t]here are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." *See id.* at 387. The Court found no constitutional violation because the Privileges and Immunities Clause only prohibited discrimination on the basis of *citizenship*, not *residency*. *Id.*

By 1941, Justice Frankfurter referred to forum non conveniens as a "familiar doctrine" that a jurisdiction may decline to entertain an action "that in justice may be tried elsewhere" and as a firmly imbedded manifestation of a "civilized judicial system." *Baltimore & Ohio R.R.. Co. v. Kepner*, 314 U.S. 44, 55 (1941). In 1947, the Court further closed any outstanding question on the constitutional legitimacy of court action to control filings by nonresident plaintiffs. In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), a Virginia resident sued a Pennsylvania corporation in a New York federal court for a negligence action arising in Virginia. Justice Jackson, in affirming the dismissal of the action with instructions that it be filed in Virginia, set forth a nonexclusive list of private and public interest factors that a court may consider in deciding whether to dismiss a case under the doctrine. *See id.* at 508-09. Many courts continue to consider these factors today. *See infra* Section IV.

What should have been the final nail in this line of cases was *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950). This Court addressed two cases arising under FELA brought in the Circuit Court of the City of St. Louis, Missouri. In both cases, the plaintiffs were not residents of Missouri, the defendant was a foreign corporation, and the accident giving rise to liability occurred outside of Missouri. *See id.* at 2-3. Citing *Douglas*, this Court affirmed that a court may limit lawsuits by nonresidents to overcrowded courts without offending the Privileges and Immunities Clause, so long as it did not distinguish between nonresident citizens and nonresident noncitizens. *See id.* at 3-4.

C. The West Virginia Decision Conflicts with the Rulings of Other Courts.

State and federal court decisions have uniformly found that the Privileges and Immunities Clause does not prevent courts from applying forum non conveniens rules to limit the accessibility of courts to nonresidents. *See, e.g., Rosenthal v. Unarco Indus., Inc.*, 297 S.E.2d 638, 641 (S.C. 1982); *Qualley v. Chrysler Credit Corp.*, 217 N.W.2d 914, 915 (Neb. 1974) (citing *Mayfield*); *Gore v. United States Steel Corp.*, 104 A.2d 670, 675 (N.J. 1954); *Price v. Atchison, T & S.F. Ry. Co.*, 268 P.2d 457 (Cal. 1954). These and many other decisions demonstrate that a state's substantial interest in preserving access to the courts for residents, controlling court dockets, and preserving taxpayer dollars for litigation brought by local litigants or disputes allows it to reasonably restrict access to nonresidents when their cause of action originates outside of the state. *See infra.*

For example, in 1997, the Texas Legislature enacted a law targeted to address an influx of out-of-state asbestos claims that had crowded its courts, much like the West Virginia statute at issue in the case at bar. *See* Tex. Civ. Prac. & Rem. Code § 71.052. The law prohibited the filing of per-

sonal injury and wrongful death claims related to asbestos exposure in state courts when the plaintiff was not a Texas resident at the time the claim arose and the plaintiff's claim arose outside Texas. *See id.* The Texas Supreme Court, relying on *Douglas* and *Mayfield*, found no violation of the Privileges and Immunities Clause because the statute discriminates solely on the basis of residence, not citizenship. *See Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex. 1999). The court recognized that modern Privileges and Immunities analysis disfavors distinctions between residents and citizens in most contexts, but found that "we are nonetheless bound to follow *Douglas* because it has never been overruled by the Supreme Court." *Id.*

The West Virginia Supreme Court of Appeals' decision in the case at bar appears to be the first of its kind. It departs from the rulings of this Court permitting distinctions based on residency in matters of judicial administration that have never been repudiated and remain both good law and sound public policy. It is also in stark contrast to the rulings of other courts finding no violation of the Privileges and Immunities Clause in such cases. Although this Court has made clear that "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute," *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)), the West Virginia Supreme Court of Appeals neglected to even consider the legislature's "substantial reason" for distinguishing between residents and nonresidents.

D. This Court Should Reaffirm the Constitutionality of Distinctions Based on Residency in Judicial Administration of the Courts.

Privileges and Immunities jurisprudence developed in cases unrelated to forum non conveniens to abandon the distinction between "residents" and "citizens," and courts began

to use the terms interchangeably. *See Piper*, 470 U.S. at 278 n.6; *Austi[illegible]v. New Hampshire*, 420 U.S. 656, 662, n.8 (1975). T[illegible]odern focus of the Privileges and Immunities analysis is whether the state's restriction of nonresident activity is "sufficiently basic to the livelihood of the nation" so as to fall within the Clause, and, if so, whether the state has shown that the restriction is closely related to a substantial interest. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988); *Piper*, 470 U.S. at 284.

The West Virginia Supreme Court of Appeals appears to have taken advantage of this Court's change in emphasis from resident v. citizen to a more functional test to completely ignore *Douglas* and *Mayfield,* without so much as a citation to these cases that are so closely on point. It ignored the substantial reason for the difference in treatment between residents and nonresidents; notably the state's objective to protect access to the courts for local residents and to address inappropriate forum shopping. It is important that this Court grant certiorari to reaffirm the continuing viability of distinctions based on residency that limit the burden on state courts, taxpayers, and local litigants, and discourage forum shopping, under modern Privileges and Immunities jurisprudence.

III. NUMEROUS STATE STATUTES AND JUDICIAL APPLICATION OF FORUM NON CONVENIENS COULD BE THROWN INTO QUESTION.

The West Virginia Supreme Court of Appeals decision affects the ability of its state's legislature to allocate limited judicial resources and stem forum shopping. Further, its construction of the U.S. Constitution could have a much broader and detrimental impact; it could throw into question numerous state statutes and judicial application of traditional forum non conveniens principles to disfavor claims filed by nonresidents that have little or no relation to the forum state.

A. State Statutes Explicitly Consider the State of Residence of the Parties.

The West Virginia Supreme Court of Appeals decision, if allowed to stand, will place in doubt the constitutionality of numerous state venue statutes regulating access to the courts on the basis of the residence of the parties. Several states have adopted forum non conveniens statutes that make such distinctions. For example, South Carolina law provides that a nonresident may not file a lawsuit in state court against a foreign corporation unless the cause of action arose within the state. S.C. Code § 15-5-150. Louisiana law applies forum non conveniens principles only when a plaintiff is a nonresident of the state; the statute exempts plaintiffs who are "domiciled in this state." La. Code Civ. Proc. art. 123(B). Virginia law provides that only "a person who is not a resident of the Commonwealth" may request dismissal on the basis that there is a more convenient forum which has jurisdiction over all the parties. Va. Code Ann. § 8.01-265.

Several states have adopted laws specific to asbestos or silica litigation applicable to nonresidents. Florida law provides that "[a] civil action alleging an asbestos or silica claim may be brought in the courts of this state if the plaintiff is domiciled in this state or the exposure to asbestos or silica that is a substantial contributing factor to the physical impairment of the plaintiff on which the claim is based occurred in this state." Fla. Stat. § 774.205(1). Similarly, Georgia law provides that "a civil action alleging an asbestos claim or silica claim may only be brought or maintained in the courts of Georgia if the plaintiff, whether a citizen of Georgia or a citizen of some other state, is a resident of Georgia at the time of filing the action or the exposure to asbestos or silica on which the claim is based occurred in Georgia. . . ."). Ga. Code § 51-14-8. Tennessee law states, "No civil action alleging a silica claim or mixed dust disease

claim may be filed in the courts of Tennessee after the effective date of this part unless the plaintiff was a resident of Tennessee at the time the claim arose or the plaintiff's claim arose in Tennessee." 2006 Tenn. Pub. Acts, ch. 728, § 9(a).

State legislatures, in enacting these laws, relied on well-settled opinions of this Court that distinctions based on residency for the purpose of controlling limited judicial resources are constitutionally permissible. The West Virginia decision threatens to encourage constitutional challenges to these and other state venue laws and may discourage other states from enacting reasonable, necessary, and narrowly tailored laws to address clogging of their courts with nonresident claims that have little or no relation to their state.

B. The State of Residence of the Plaintiff is an Important Factor in Judicial Application of Forum Non Conveniens.

State courts, in exercising their inherent power to dismiss cases for forum non conveniens or in applying state codification of forum non conveniens principles, frequently consider the state of residence of the plaintiff in their analysis.

Often, courts find that while a plaintiff's choice of forum receives substantial deference, little or no deference is extended when a plaintiff is a nonresident. *See, e.g., Coonley & Coonley v. Turck*, 844 P.2d 1177, 1182 (Ariz. Ct. App. 1993); *Kaiser Found. Health Plan of Mid-Atlantic States, Inc. v. Rose*, 583 A.2d 156, 158 (D.C. 1990); *Marchman v. NCNB Texas Nat'l Bank*, 898 P.2d 709, 720 (N.M. 1995).

Other states find that where the plaintiff is a resident of the forum state, "the doctrine of forum non conveniens has only extremely limited application," *Crowson v. Sealaska Corp.*, 705 P.2d 905, 908 (Alaska 1985) (citing *Thomson v. Cont'l Ins. Co.*, 427 P.2d 764, 768 (Cal. 1967)), or applies only in "unusually extreme circumstances." *Telemundo Net-*

work Group, LLC v. Azteca Int'l Corp., No. 3d05-259, 2006 WL 921919 (Fla. Ct. App. Apr. 12, 2006) (quoting *SME Racks, Inc. v. Sistemas Macanicos Para Electronica, S.A.*, 382 F.3d 1097 (11th Cir. 2004); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). Some courts find that forum non conveniens does not apply at all in cases involving a resident plaintiff. *See PMI Mortgage Ins. Co. v. Deseret Fed. Sav. & Loan*, 757 P.2d 1156, 1158 (Colo. Ct. App. 1988). These courts generally engage in a forum non conveniens analysis *only when the plaintiff is a nonresident*. Such limitations are "based primarily on the interest of a state in providing a dispute resolution forum for its own residents." *See id.* at 1158.

Finally, many, if not all, state courts explicitly consider plaintiff's state of residence in determining the availability of a more convenient forum. Some courts consider it "an important factor," even if not a controlling one. *See, e.g., Silver v. Great American Ins. Co.*, 278 N.E.2d 619 (N.Y. 1972).

State courts frequently use forum non conveniens to dismiss the cases of nonresidents where the claim did not arise in the state. For example, the Mississippi Supreme Court has repeatedly ordered dismissal of asbestos and pharmaceutical product liability claims brought by nonresidents. *See, e.g., Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853, 858-59 (Miss. 2005); *Illinois Cent. R.R. Co. v. Gregory*, 912 So. 2d 829, 836-37 (Miss. 2005); *Culbert v. Johnson & Johnson and Janssen Pharmaceutica, Inc. v. Jackson*, 883 So. 2d 550, 553 (Miss. 2004). These decisions reflect the same public policy considerations as the West Virginia statute: an attempt to unclog court dockets crammed with nonresident claims at the expense of local citizens. *See Illinois Cent. R.R. Co.*, 912 So. 2d at 836. The constitutionality of such legitimate and rational means to control overburdened court dockets has never before been subject to question, until now.

As these statutes and decisions demonstrate, application

of the Privileges and Immunities Clause to prohibit consideration of a plaintiff's state of residence would have an extraordinarily broad impact across the nation. This Court should grant certiorari to clarify that emphasis on a party's state of residence in when applying forum non conveniens principles is, and remains, constitutionally permissible.

IV. CERTIORARI IS NEEDED TO REAFFIRM LEGITIMATE STATE INTERESTS IN PRESERVING COURT ACCESS AND DISCOURAGING FORUM SHOPPING.

This Court's precedent recognizes that states may constitutionally distinguish between residents and nonresidents with respect to a covered privilege if the restriction is closely related to a substantial interest. *See Friedman*, 487 U.S. at 64-65. This Court should grant certiorari because the West Virginia Supreme Court of Appeals' interpretation of the Privileges and Immunities Clause creates a chilling effect on other states that may wish to enact rational venue laws and apply principles of forum non conveniens. The West Virginia decision trespasses on the important public policy considerations that underlie such legislative and judicial actions.

A. Interests of Local Residents, Judicial Administration, Jurors and Taxpayers are at Stake.

The West Virginia Legislature adopted the statute at issue to control a flood of litigation entering the state by nonresidents whose claims had little or no relation to the state. It did so for precisely the same public interest considerations recognized by this Court in *Gulf Oil Corp. v. Gilbert*:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. . . . There is an appropriateness too, in having the trial . . . in a forum that is at home with the state law that must govern the

> case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

330 U.S. at 508-09. Moreover, such litigation is paid for by taxpayers and heard by jurors who have no interest in foreign claims. In reliance on *Gilbert*, state courts have considered case load congestion in deciding motions for forum non conveniens and dismissing cases brought by out-of-state plaintiffs. *See, e.g., Lesser v. Boughey*, 965 P.2d 802, 806 (Haw. 1998). The Michigan Supreme Court has noted that the public interest favors declining jurisdiction when the case is "imported litigation," particularly in light of already crowded court dockets. *Anderson v. Great Lakes Dredge & Dock Co.*, 309 N.W.2d 539, 543-44 (Mich. 1981). Some state courts have even opted to discontinue action in a pending case after the plaintiff moves out of the state. *See, e.g., Carter v. Netherton*, 302 S.W.2d 382 (Ky. Ct. App. 1957).

B. Haziness in the Constitutionality of Restrictions on Nonresident Access to the Courts Will Have a Chilling Effect on State Efforts to Address Forum Shopping.

States have a substantial interest in regulating access to their courts to discourage and prevent forum shopping for favorable law, procedures, or juries. These motivations led the West Virginia Legislature to enact the law at issue. Unwarranted forum shopping is also a concern in the case at bar, where the plaintiff may seek the benefit of West Virginia's adoption of comparative fault and avoid Virginia's application of contributory negligence. *See infra.*

States have applied the doctrine of forum non conveniens to stem such abuse, and their authority to do so has never been subject to question by the Privileges and Immunities Clause. For example, the Supreme Court of Oklahoma has found that an automobile accident case brought by an Arkan-

sas resident in an Oklahoma court was properly dismissed after the plaintiff candidly stated: "Naturally, plaintiff and her attorneys made this selection because they felt this would be the most advantageous jurisdiction for the presentation of the plaintiff's case." *Pruitt Tool & Supply Co. v. Windham*, 379 P.2d 849, 850 (Okla. 1963). The court found, however, that the potential for a nonresident plaintiff to obtain a higher verdict did not outweigh the burden to the court of hosting the litigation. *See id.* (citing *St. Louis-San Francisco Railway Co. v. Superior Ct.*, 290 l .2d 118 (Okla. 1955)).

District of Columbia courts have also applied forum non conveniens to dismiss the cases of nonresidents who file suit in the District to avoid tort reform laws in their home states. For example, in *Kaiser Found. Health Plan of Mid-Atlantic States, Inc. v. Rose*, the District of Columbia Court of Appeals found that the trial court properly dismissed a Virginia resident's medical malpractice claim in an action that arose in Virginia. *See* 583 A.2d 156 (D.C. 1990). The court found that "one of the purposes of the doctrine of forum non conveniens is to prevent forum-shopping" and that this purpose would be "ill-served" if the plaintiff were permitted to avoid Virginia's limit on noneconomic damages by bringing an action in the District. *Id.* at 160.

More recently, the District of Columbia Court of Appeals found that a case brought by several nonresident psychiatric patients against several corporate entities and doctors was properly dismissed. *See Eric T. v. Nat'l Med. Enter., Inc.*, 700 A.2d 749 (D.C. 1997). The court found that plaintiffs appeared to file their claims in the District to avoid Maryland's tort reform restrictions, including a mandatory arbitration system, and noted that nonresidents were increasingly bringing actions in the District due to the courts' reputation for reducing delays on its civil calendar. *See id.* at 753. The court expressed concern, much like the concerns underlying

the West Virginia law, that the nonresident cases at issue were the tip of the iceberg. Allowing nonresidents to proceed with such complex cases would overwhelm the court's already crowded docket and place a significant burden on local citizens who would need to serve on lengthy trials to decide such cases. *See id.* at 757.

Here, the plaintiff likely chose to file in West Virginia rather than Virginia, where the plaintiff lives and the accident occurred, to benefit from its law. While West Virginia has adopted a system of comparative fault, *see Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W. Va. 1979), Virginia continues to apply contributory negligence as a complete bar to recovery, *see Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987). While choice of law principles would ordinarily mandate that West Virginia apply Virginia law to avoid such forum shopping, the West Virginia Supreme Court of Appeals has held that it will not apply the contributory negligence rules of other states as a matter of public policy. *See Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280, 282-83 (W. Va. 1998). If West Virginia courts are not permitted to dismiss the claims of nonresidents whose claims do not arise in West Virginia, its courts will see more claims from both its neighbors, Maryland and Virginia, which apply contributory negligence. *See Franklin v. Morrison*, 711 A.2d 177 (Md. 1998). Thus, the floodgate restraining nonresident asbestos claims is likely to burst.

CONCLUSION

For the foregoing reasons, *amici curiae* the American Tort Reform Association, the Chamber of Commerce of the United States of America, the NFIB Legal Foundation, and the West Virginia Chamber of Commerce respectfully request that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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APPENDIX

APPENDIX A

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation representing a membership of more than three million businesses and organizations of every size. U.S. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the U.S. Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the U.S. Chamber has filed amicus curiae briefs in numerous cases involving issues of vital concern to the nation's business community.

The NFIB Legal Foundation, a 501(c)(3), tax-exempt public-interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business ("NFIB"), the nation's leading small-business advocacy association, with offices in Washington, D.C. and all fifty state capitals. Founded in 1943 as a non-profit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files

amicus briefs in the courts that inform courts how the decision they make in a given case will impact small businesses nationwide. NFIB's members own and operate many of America's independent businesses, which create two-thirds of the new jobs in the United States.

The West Virginia Chamber of Commerce ("West Virginia Chamber") is the recognized "voice of business" in West Virginia as an advocate in the judicial, legislative and executive branches for its 1,800 members. In that role, it strives to encourage public policies that foster relocation of new business to and the expansion of existing businesses within the state, so that all West Virginians can enjoy the benefits of a robust economy. The Chamber has been a consistent advocate for a legal system that is predictable in its outcomes and functions within the mainstream of established jurisprudence to ensure that businesses in West Virginia can and do operate under the same general ground rules as their competitors elsewhere in this country. Preserving a fair judicial system not only benefits businesses involved in commerce, but the West Virginians who have claims to be heard efficiently in the courts.